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POLICE DEPARTMENT OF THE CITY OF BURBANK (erroneously sued as an  
independent entity named "BURBANK POLICE DEPARTMENT")

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

OMAR RODRIGUEZ; CINDY GUILLEN-  
GOMEZ; STEVE KARAGIOSIAN; ELFEGO  
RODRIGUEZ; AND JAMAL CHILDS,

Plaintiffs,

v.

BURBANK POLICE DEPARTMENT; CITY  
OF BURBANK; AND DOES 1 THROUGH  
100, INCLUSIVE,

Defendants.

BURBANK POLICE DEPARTMENT; CITY  
OF BURBANK,

Cross-Complainants,

v.

OMAR RODRIGUEZ, an Individual;

Cross-Defendant.

Case No. BC 414602

**DEFENDANT CITY OF BURBANK'S  
BRIEF REGARDING THE  
INADMISSIBILITY OF TESTIMONY OF  
NAYIRI NAHABEDIAN;**

**DECLARATION OF VERONICA VON  
GRABOW IN SUPPORT THEREOF.**

Location: 37

Judge: The Honorable Joanne O'Donnell

File Date: May 28, 2009

Trial Date: March 19, 2012 (Plff. Karagiosian)

May 2, 2012 (Plff. Karagiosian);

Jul. 11, 2012 (Plff. O. Rodriguez)

Discovery Referee: Hon. Diane Wayne, Ret.

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ORIGINAL FILED  
SUPERIOR COURT OF CALIFORNIA  
COUNTY OF LOS ANGELES

MAR 27 2012

John A. Chace, Executive Officer/Clerk  
BY  Deputy  
Gloria Robinson

DEFENDANT CITY OF BURBANK'S BRIEF REGARDING THE INADMISSIBILITY  
OF TESTIMONY OF NAYIRI NAHABEDIAN

## I. Introduction

It is unclear why Plaintiff Steve Karagiosian has included Nayiri Nahabedian's ("Nahabedian") on his witness list, because she is completely unqualified to testify as a lay or expert witness in this case.

In this trial, Karagiosian is claiming that he was harassed based on his Armenian national origin in violation of the California Fair Employment and Housing Act, and that Defendant City of Burbank (“Burbank”) failed to prevent that harassment. Nahabedian provided diversity training to Burbank Police Department officers *and nothing more*. Nahabedian *has no personal knowledge relevant to Karagiosian’s claims* and therefore cannot testify as a lay witness. Nahabedian should not be permitted to testify as an expert witness for three independent reasons, *any one of which warrants the exclusion of her testimony at trial*: (1) Nahabedian is not qualified to testify as an expert witness; (2) the topics on which Nahabedian would presumably testify are improper subjects of expert testimony; and (3) Kargiosian has never designated or identified Nahabedian as an expert witness.

On top of everything else, the doctrine of law of the case precludes admission of the testimony by Nahabedian that Karagiosian presumably intends to offer at trial: the appellate court has already determined *in this same case* that the testimony by Nahabedian that plaintiffs think supports their claims *is inadmissible*.

## II. Argument

**A. Nahabedian Cannot Testify As A Lay Witness Because She Has No Personal Knowledge Relevant To Karagiosian's Claims**

Evidence Code Section 702(a) provides that “testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter,” and that “such personal knowledge must be shown before the witness may testify concerning the matter.” Evid. Code § 702(a).

Kargiosian cannot show that Nahabedian was personally involved in any material way in the events surrounding his claims. Nahabedian simply provided diversity training to Burbank

1 Police Department officers. She did not conduct any type of investigation for Burbank, and *by her*  
2 *own admission* has no basis to conclude that anyone at the Burbank Police Department engaged in  
3 harassment or discrimination. See Declaration of Veronica von Grabow ("von Grabow Decl."),  
4 attached hereto, ¶ 2 and Exhibit A, Deposition of Nayiri Nahabedian ("Nahabedian Depo.") at  
5 131:14-16, 131:17-132:3. *Simply put, Nahabedian has no personal knowledge of anything*  
6 *relating to Karagiosian's claims that he was harassed based on his Armenian ancestry, and*  
7 *therefore cannot testify as a lay witness.*

8 **B. Nayiri Nahabedian Cannot Testify As An Expert Witness For Several**  
9 **Independent Reasons**

10 **1. Nahabedian Is Not Qualified To Testify As A "Human Resources"**  
11 **Expert**

12 Since Kargiosian failed to disclose Nahabedian as an expert witness (see Section II(B)(3),  
13 *infra*), Burbank is unsure exactly what type of "expert" Karagiosian will represent that  
14 Nahabedian is at trial. Burbank suspects that Kargiosian may offer Nahabedian as some type of  
15 human resources expert, however, Nahabedian qualifies as no such thing.

16 A person is qualified to testify as an expert only if he or she has *sufficient knowledge,*  
17 *skill, experience, training or education in the particular field at issue so that his or her*  
18 *testimony would be likely to assist the jury in its search for the truth.* See Evid. Code § 720(a);  
19 *Mann v. Cracchiolo*, 38 Cal. 3d 18, 38 (1985); *People v. Catlin*, 26 Cal. 4th 81, 131 (2001).  
20 Once a party objects to an expert witness's qualifications, the party offering the expert must  
21 demonstrate that the expert has the requisite special knowledge, skill, experience, training or  
22 education before the witness may testify. See Evid. Code § 720(a). Courts routinely refuse to  
23 allow people to testify as experts when those people cannot show that they are an expert in the  
24 subject they plan to testify about. See, e.g., *Finn v. G. D. Searle & Co.*, 35 Cal. 3d 691, 703-704  
25 (1984) (dermatologist not qualified to testify on a drug manufacturer's duty to warn in connection  
26 with a prescription drug designed to fight a skin disease; only an expert in drug epidemiology  
27 would be qualified); *People v. Hogan*, 31 Cal. 3d 815, 852-53 (1982) ("[T]he qualifications of an  
28 expert must be related to the particular subject upon which he is giving expert testimony.

1 Qualifications on related subject matter are insufficient... [I]n this case Kyle was undoubtedly  
2 qualified to testify about whether the stains were blood and about the blood typing of the stains.  
3 However, under Evidence Code section 720, he did not demonstrate special knowledge, skill,  
4 experience, training or education to testify as an expert on the particular subject of determining  
5 whether blood was deposited by flying drops or by surface-to-surface contact.”) (*overruled on*  
6 *other grounds in People v. Cooper*, 53 Cal. 3d 771 (1991)).

7 Nahabedian testified at her deposition that she does not hold any kind of advanced degree  
8 in human resources or law, and has taken only a single course relating to human resources. *See*  
9 von Grabow Decl., ¶ 2, Exhibit A, Nahabedian Depo., 87:22-88:1, 88:11-18. Nahabedian testified  
10 that while she had provided training to the Burbank and Glendale police departments, she had  
11 never provided training to any other police departments or companies or employers in general.  
12 *See Id.*, 13:7-10, 86:22-87:21. Nahabedian also testified that she had never had her deposition  
13 taken before it was taken in this matter, and had never been called to testify as an expert in  
14 diversity issues in court. *See Id.*, 7:14-15, 13:14-16. In sum, Nahabedian cannot show that she  
15 has the sufficient knowledge, skill, experience, training or education to qualify as human resources  
16 expert (or any other type of expert) and the court should refuse to permit her testimony on that  
17 basis.

18 **2. The Topics On Which Nahabedian Would Presumably Testify Are**  
19 **Improper Subjects of Expert Testimony**

20 **a. Nahabedian may not testify about the type of policies and**  
21 **training that Burbank is legally required to provide, nor may**  
22 **she testify about whether Burbank effectively provided such**  
**training and policies.**

23 Testimony about *the type of policies and training that Burbank is legally required to*  
24 *provide* and *whether Burbank provided such training and policies* would both improperly invade  
25 the role of this Court because it would instruct the jury on the law *and* improperly supplant the  
26 role of the jury by applying the law to the facts. Expert opinion testimony is only admissible if it  
27 is “sufficiently beyond common experience” and will “assist the trier of fact” in its determination  
28 of the issues. *See* Cal. Evid. Code § 801(a); *People v. Torres*, 33 Cal. App. 4th 37, 45 (1995)

1 (“Opinion testimony may be admitted where it will assist the jury to understand the evidence or a  
2 concept beyond common experience.”). The law does *not* permit an expert to opine on the law or  
3 how the law should apply to the facts of the case at hand. *See, e.g., Downer v. Bramet*, 152 Cal.  
4 App. 3d 837, 841 (1984) (proper to exclude testimony of lawyer regarding a legal conclusion  
5 because “[t]he manner in which the law should apply to particular facts is a legal question and is  
6 not subject to expert opinion”) (citation omitted) (internal quotation marks omitted); *People v.*  
7 *Torres*, 33 Cal. App. 4th at 45-46 (“It is the Court and not the witness which must declare what the  
8 law is[.]”); *Summers v. A.L. Gilbert Co.*, 69 Cal. App. 4th 1155, 1183 (1999) (“[W]hen an expert’s  
9 opinion amounts to nothing more than an expression of his or her belief on how a case should be  
10 decided, it does not *aid* the jurors, it *supplants* them.”) (italics in original).

11                   **b. Nahabedian may not testify about whether Burbank met its**  
12                   **obligations under the California Fair Employment and Housing**  
                      **Act (FEHA)**

13           Similarly, Kargiosian may seek to have Nahabedian tell the jury that Burbank did not meet  
14 its obligations under FEHA to (for example) prevent harassment or investigate allegations of  
15 harassment. Such testimony would be improper because whether Burbank met any obligation it  
16 may have had under FEHA related to Karagiosian’s allegations of harassment is not an issue on  
17 which the jury needs expert advice. *See* Cal. Evid. Code § 801.

18           *Kotla v. Regents of University of California* is directly on point. 115 Cal. App. 4th 283  
19 (2004). In *Kotla*, the Court of Appeal reversed a judgment after a human resources expert  
20 testified about the significance of certain facts as they related to the former employee’s retaliation  
21 claim. *Id.* at 293. The Court held that the testimony:

22                   [C]reated an unacceptable risk that the jury paid unwarranted  
23                   deference to [the expert’s] purported expertise when in reality he  
24                   was in no better position that they were to evaluate the evidence  
25                   concerning retaliation. *Absent unusual facts, it must be presumed*  
                      *that jurors are capable of deciding a party’s motive for themselves*  
                      *without being told by an expert which findings on that issue the*  
                      *evidence supports.*

26 *Id.* (emphasis added). In explaining its holding, the Court noted that the purported expert did not  
27 have any unique experience related to the circumstances giving rise to the litigation and did not  
28 possess any special expertise for weighing the evidence. *Id.* at 294. As such, the “expert’s”

1 opinions about the evidence “did not offer the jury anything more than the lawyers can offer in  
2 argument.” *Id.* at 294 (citations omitted) (internal quotation marks omitted); *see also Lipsett v.*  
3 *University of Puerto Rico*, 740 F. Supp. 921, 925 (D.P.R. 1990) (court excluded plaintiff’s two  
4 sexual harassment expert witnesses, a social worker and social psychologist, because they were  
5 nothing more than an advocate of policy before the jury); *Brink v. Union Carbide Corp.*, 41 F.  
6 Supp. 2d 402, 405 (S.D.N.Y. 1997) (finding that age discrimination cases can be evaluated by a  
7 jury without the assistance of a human resources expert).

8 **3. Kargiosian Failed To Disclose Nahabedian As An Expert Witness**

9 California Code of Civil Procedure Section 2034.260 governs the initial disclosures of  
10 expert witnesses. That Section requires that a party list the name and address of any person the  
11 party expects to offer expert testimony at trial, and that a party submit an expert declaration stating  
12 the expert’s qualifications and general substance of the testimony the expert is expected to give.  
13 Code Civ. Proc. § 2034.260(b), (c). California Code of Civil Procedure Section 2034.280 permits  
14 a party to submit a supplemental expert witness list within 20 days of the initial exchange.

15 Of course, the policy behind these disclosure rules is to provide the other side fair notice  
16 relating to evidence that will be presented at trial so that the other side can properly prepare its  
17 defense to that evidence, whether it be a cross-examination or another expert witness. California  
18 Code of Civil Procedure Section 2034.300 provides that the Court “shall” exclude from evidence  
19 the expert opinion of any witness offered by any party who has unreasonably failed to comply  
20 with the disclosure rules.

21 Kargiosian has not designated or identified Nahabedian as an expert witness in this  
22 litigation at any point, nor has he sought leave from the court to do so. Karagiosian’s initial expert  
23 witness list filed on April 19, 2011 does not include Nahabedian and Kargiosian never filed a  
24 supplemental expert witness list. *See* von Grabow Decl., ¶ 3 and Exhibit B. Any attempt to  
25 introduce Nahabedian as an expert witness at this point in the trial would be in blatant violation of  
26 the statutory disclosure requirements, would result in substantial prejudice to Burbank and should  
27 not be permitted. *See* Code Civ. Proc. § 2034.300.



1           C.     **The Testimony Nahabedian Provided In Deposition Is Inadmissible**  
2                   **Under The Doctrine Of The Law Of The Case**

3           In adjudicating the claims of another plaintiff in this same case, this Court sustained  
4 Burbank's objections to Nahabedian's deposition testimony. *See* von Grabow Decl., paragraph 4,  
5 Exhibit C, pp. 135-64 (excerpts from Defendant's Evidentiary Objections to Plaintiff's Evidence  
6 in Opposition to Motion for Summary Judgment relating to Plaintiff Elfego Rodriguez, evidentiary  
7 objections 239-258), and Exhibit D, p 1-2 (this Court's Order Granting Motion of Defendant City  
8 of Burbank for Summary Judgment on Elfego Rodriguez's claims and sustaining Burbank's  
9 evidentiary objections 239 through 258). The appellate court upheld the trial court's ruling  
10 sustaining those objections. *See* von Grabow Decl., paragraph 6, Exhibit E, pages 12 and 17  
11 (Court of Appeal decision). Thus, to the extent Karagiosian is planning to put Nahabedian on the  
12 stand to provide the same or similar testimony to that she gave in deposition, the doctrine of the  
13 law of the case applies.<sup>1</sup> Under that doctrine, an appellate determination of the admissibility of a  
14 particular kind of evidence is binding on the trial court and all future litigation in the same case.<sup>2</sup>  
15 In other words, *because the appellate court upheld the trial court's ruling sustaining Burbank's*  
16 *objections to Nahabedian's deposition testimony in this case, such evidence cannot be used to*  
17 *support Karagiosian's claims.*

18  
19  
20  
21           <sup>1</sup>     *In Re. Baird's Estate*, 193 Cal. 225, 236, 244 (1924) ("The evidence may be different and  
22 yet unless it is substantially different in a material respect, the doctrine of the law of the case  
applies.... [N]ew evidence must be 'materially,' 'essentially,' or 'substantially' different before it  
can be held the doctrine does not apply.") (citations omitted).

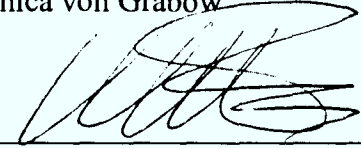
23           <sup>2</sup>     *See, e.g., Davis v. Edmonds*, 218 Cal. 355, 359 (Cal. 1933) ("The evidence involved is the  
24 same on this as on the former appeal. The decision on the former appeal, having established the  
25 character and competency of the evidence as the proper subject of a book account, is binding on  
the parties hereto on this appeal."); *Deacon v. Bryans*, 212 Cal. 87, 89 (1931) ("[The decision of  
26 the Court of Appeal] has become the law of the case, binding upon the parties in all future  
litigation in this action whether said litigation is carried on before the trial court, or in any of the  
27 appellate courts of the state."); *People v. Barragan*, 32 Cal. 4th 236, 246 (2004) ("[A]n appellate  
28 court's determination that the evidence is insufficient to justify a finding or a judgment ...  
establishes as the law of the case that all the evidenced adduced at the previous trial was  
insufficient as a matter of law to establish the finding or judgment) (internal quotation marks  
omitted).

1 **III. Conclusion**

2 For the foregoing reasons, Burbank requests that the Court exclude the testimony of  
3 Nahabedian during the trial of Karagiosian's claims.

4  
5 Dated: *March 26, 2017*

MITCHELL SILBERBERG & KNUPP LLP  
Lawrence A. Michaels  
Veronica von Grabow

6  
7  
8  
9 By:   
Veronica von Grabow  
Attorneys for Defendants and  
Cross-Complainant CITY OF BURBANK,  
including the POLICE DEPARTMENT OF  
10 THE CITY OF BURBANK (erroneously  
11 sued as an independent entity named  
12 "BURBANK POLICE DEPARTMENT")  
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**DECLARATION OF VERONICA VON GRABOW**

**DECLARATION OF VERONICA VON GRABOW**

**DECLARATION OF VERONICA VON GRABOW**

I, Veronica von Grabow, hereby declare as follows:

1. I am an attorney at law duly licensed to practice law in the State of California and before this Court. I am an associate attorney with the law firm of Mitchell Silberberg & Knupp LLP, attorneys of record for Defendant and Cross-Complainant City of Burbank, including the Police Department of the City of Burbank ("Burbank"). I have personal knowledge of the following facts and, if called and sworn as a witness, could and would competently testify thereto.

2. Attached hereto as Exhibit A are true and correct copies of excerpts from the deposition transcript of Nayiri Nahabedian.

3. Attached hereto as Exhibit B is a true and correct copy of Plaintiff Steve Karagiosian's ("Karagiosian") expert witness disclosure, served on my firm on or about April 19, 2011.


4. Attached hereto as Exhibit C is a true and correct copy of excerpts from Defendant's Evidentiary Objections to Plaintiff's Evidence in Opposition to Motion for Summary Judgment relating to Plaintiff Elfego Rodriguez, filed by my offices on or about May 7, 2010.

5. Attached hereto as Exhibit D is a true and correct copy of this Court's May 21, 2010 Order granting summary judgment to Burbank on plaintiff Elfego Rodriguez's claims in this same case.

6. Attached hereto as Exhibit E is a true and correct copy of the Court of Appeal's decision upholding this Court's granting of summary judgment in favor of Burbank on plaintiff Elfego Rodriguez's claims, filed February 27, 2012.

1 Executed this 26<sup>th</sup> day of March 2012, at Los Angeles, California.

2  
3 I declare under penalty of perjury under the laws of the California that the foregoing is true  
4 and correct.

5   
6 \_\_\_\_\_  
7 Veronica von Grabow

**EXHIBIT A**

**EXHIBIT A**

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES - CENTRAL DISTRICT

OMAR RODRIGUEZ; CINDY  
GUILLEN-GOMEZ; STEVE  
KARGIOSIAN; ELFEGO  
RODRIGUEZ; AND JAMAL  
CHILDS;

Plaintiffs,

vs.

BURBANK POLICE DEPARTMENT;  
CITY OF BURBANK; AND DOES 1  
THROUGH 100, INCLUSIVE.

Defendants.

**CERTIFIED  
COPY**

Case No: BC 414 602  
Volume 1

DEPOSITION OF NAYIRI NAHABEDIAN

Encino, California

Tuesday, February 23, 2010

REPORTED BY: Hayley Clifford  
CSR No. 13436  
Certified Shorthand Reporter  
Registered Professional Reporter

1 reporter please administer the oath.

2

3

NAYIRI NAHABEDIAN,

4

called as a witness by and on behalf of the

5

Plaintiff and having been first duly sworn by the

6

Certified Shorthand Reporter, was examined and

7

testified as follows:

8

EXAMINATION

9

BY MS. GRESEN:

10

Q. Would you please spell your name for the

11

record.

12

A. N-a-y-i-r-i, last name,

13

N-a-h-a-b-e-d-i-a-n.

14

Q. Have you had your deposition taken before?

15

A. No.

16

Q. I'm just going to go through a few of the

17

processes that we're going to be undertaking so

18

that we're clear before the start of deposition.

19

Okay?

20

A. Okay.

21

Q. To my right, to your left is the court

22

reporter, who is taking down everything that you

23

say, everything I say, and everything that the

24

counsel says in this room. Therefore, it's

25

important that we wait for each other to finish



1 a couple of other examples, but that's --

2 Q. Other than the Glendale PD -- well, let me  
3 ask it this way: Did you provide a diversity  
4 training to the Burbank Police Department at any  
5 time?

6 A. Yes.

7 Q. Other than the Glendale and Burbank PDs,  
8 have you provided any other diversity training to  
9 any other municipalities or companies?

10 A. Municipalities or companies, no.

11 Q. Okay. Which came first, the training on  
12 the Glendale PD or the Burbank PD?

13 A. Glendale.

14 Q. Have you ever been called to testify as an  
15 expert in diversity issues in court at any time?

16 A. No.

17 Q. How did you first learn that the  
18 Burbank Police Department was looking for a  
19 diversity trainer?

20 A. One of the commissioners on the police  
21 commission contacted me because he knows that I  
22 have expertise in this field and said to contact  
23 the chief because the chief is interested in doing  
24 this sort of training.

25 Q. When in time -- what date approximately

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
FOR THE COUNTY OF LOS ANGELES

OMAR RODRIGUEZ; CINDY  
GUILLEN-GOMEZ; STEVE  
KARAGIOSIAN; ELFEGO  
RODRIGUEZ; AND JAMAL CHILDS,

Plaintiffs,

vs.

BURBANK POLICE DEPARTMENT;  
CITY OF BURBANK; TIM STEHR;  
KERRY SCHILF; JAMIE "J.J."  
PUGLISI; DAN YADON; KELLY  
FRANK; PAT LYNCH; MIKE  
FARRINELLO; AARON KENDRICK;  
DARIN RYBURN; AND DOES 1  
THROUGH 100, INCLUSIVE,

Defendants.

AND RELATED CROSS-ACTION.

**CERTIFIED  
COPY**

No. BC414602  
VOLUME II

DEPOSITION OF: NAYIRI NAHABEDIAN, VOLUME II  
DATE: Friday, July 30, 2010  
LOCATION: 500 North Brand Boulevard  
Twentieth Floor  
Glendale, California 91203-9946  
REPORTED BY: SUSAN C. CAMPANA, CSR 9573

**DCR**

**LITIGATION SERVICES**

**AM Best Award - Expert Service Provider 2009**

1 Mr. Stehr.

2 He is here as a party representative not as  
3 counsel representing the City of Burbank.

4 THE VIDEOGRAPHER: Would the court reporter please  
5 swear in the witness.

6  
7 NAYIRI NAHABEDIAN,  
8 having been first duly affirmed under  
9 the penalty of perjury, was examined  
10 and testified as follows:

11  
12 EXAMINATION

13 BY MR. MICHAELS:

14 Q. Okay. Good morning, Ms. Nahabedian.

15 A. Good morning.

16 Q. Did you bring your CV with you today?

17 A. No.

18 Q. Okay. Last time you said you thought you had  
19 it, but you -- but you did not.

20 Let me -- let me see if I can just go through it  
21 with you in the absence of the written CV.

22 Other than the Burbank and Glendale police  
23 departments, have you ever provided any kind of training  
24 to any other police department?

25 A. No.  
26

1 Q. Have you ever provided any kind of training to  
2 any other employer?

3 A. Yes.

4 Q. Which employer?

5 A. Cal State L.A.

6 Q. And you were providing training at Cal State  
7 L.A. to employees of Cal State L.A.?

8 A. No.

9 Q. You were providing that to students in an  
10 academic setting; correct?

11 A. Yes.

12 Q. Okay. I'm not -- I'm not referring to that as  
13 training on behalf of an employer. I'm talking about  
14 what -- something similar to what you did for Glendale  
15 and Burbank where you trained employees.

16 A. Uh-huh.

17 Q. Do you understand my question?

18 A. Yes.

19 Q. Okay. So clarified, have you provided training  
20 on behalf of any other employers?

21 A. No.

22 Q. Do you have any kind of advanced degree in human  
23 resources?

24 A. No.

25 Q. Do you have any kind of advanced degree in law?  
26

1 A. No.

2 Q. Do you have any kind of advanced degree in  
3 psychology?

4 A. It's part of it. Social work has psychology  
5 within it.

6 Q. All right. And you --

7 A. Yes.

8 Q. Your degree in social work is what? A master's  
9 certificate?

10 A. Yes.

11 Q. Okay. In the course of your education, did you  
12 take any classes regarding human resources?

13 A. Yes. Organizational behavior, it would be  
14 called.

15 Q. So one class?

16 A. Uh-huh.

17 Q. That was a "yes"?

18 A. Yes.

19 Q. You have to answer aloud so that the court  
20 reporter can take it down.

21 Okay?

22 A. Okay.

23 Q. Do you know anyone personally who is a police  
24 officer?

25 A. Yes.

26

1 any Burbank police officer had engaged in any form of  
2 misconduct? That's true, isn't it?

3 A. It's -- what -- it's true to an extent.

4 Q. Isn't it true -- well, no. It's true 100  
5 percent. It was no part of your charge to reach any  
6 conclusions about whether anybody had engaged in any form  
7 of harassment or discrimination. That was in no way  
8 something you were instructed to do; isn't that right?

9 A. Correct.

10 Q. Okay. You would not reach a conclusion to  
11 accuse someone of harassment or discrimination without  
12 conducting an investigation, would you?

13 A. Correct.

14 Q. Okay. And you never did conduct any such  
15 investigation; correct?

16 A. Yes.

17 Q. So you have absolutely no basis as you sit here  
18 today to give any opinions or conclusions about whether  
19 anyone at the Burbank Police Department engaged in any  
20 form of harassment or discrimination; isn't that true?

21 A. I can only tell you what I was told.

22 Q. All right. Let me say -- repeat the question.  
23 Having conducted no investigation, which would  
24 be necessary before you reached any conclusions about  
25 whether somebody had committed some form of  
26



1 discrimination or harassment, you are completely without  
2 a basis to make such an accusation; correct?

3 A. Yes.

4 Q. Now, let's take an example that came up during  
5 the training which you talked about.

6 You said that it came to your attention that  
7 somebody had a picture of a woman and that there was some  
8 relationship to a locker.

9 A. (No audible response.)

10 Q. That was a "yes"?

11 A. Yes.

12 Q. Okay. Is this something that someone told you  
13 orally during one of the presentations that you made?

14 A. Yes.

15 Q. Aloud in the room with the other people present?

16 A. Yes.

17 Q. Did they say it was they, themselves, who had the  
18 picture?

19 A. No.

20 Q. Did they say it was someone else?

21 A. Yes.

22 Q. Did they say who?

23 A. No.

24 Q. Did they say whether it was male or female?

25 A. No.

26

**EXHIBIT B**

**EXHIBIT B**

1 SOLOMON E. GRESEN [SBN: 164783]  
2 STEVEN V. RHEUBAN [SBN: 48538]  
3 ROBERT C. HAYDEN [84816]  
4 LAW OFFICES OF RHEUBAN & GRESEN  
5 15910 VENTURA BOULEVARD, SUITE 1610  
6 ENCINO, CALIFORNIA 91436  
7 TELEPHONE: (818) 815-2727  
8 FACSIMILE: (818) 815-2737

9 Attorneys for Plaintiffs

(SPACE BELOW FOR FILING STAMP ONLY)

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF LOS ANGELES, CENTRAL DISTRICT

OMAR RODRIGUEZ; CINDY GUILLEN-  
GOMEZ; STEVE KARAGIOSIAN;  
ELFEGO RODRIGUEZ; AND JAMAL  
CHILDS,

Plaintiffs,

-vs-

BURBANK POLICE DEPARTMENT; CITY  
OF BURBANK; AND DOES 1 THROUGH  
100, INCLUSIVE.

Defendants.

CASE NO.: BC 414 602

Assigned to: Hon. Joanne B. O'Donnell, Judge  
Dept. 37

Complaint Filed: May 28, 2009

PLAINTIFF STEVE KARAGIOSIAN'S  
EXPERT DISCLOSURE

Trial Date: June 8, 2011

BURBANK POLICE DEPARTMENT; CITY  
OF BURBANK,

Cross-Complainants,

-vs-

OMAR RODRIGUEZ, and Individual,

Cross- Defendant

1  
PLAINTIFF STEVE KARAGIOSIAN'S EXPERT DISCLOSURE

1  
2 Plaintiff Steve Karagiosian hereby designates the following expert witnesses:

- 3 1. Oliver "Lee" Drummond  
4 Drummond, Inc.  
5 2554 Sequoia Avenue  
6 Sanger CA 93657 3817  
7

8 Mr. Drummond has been designated as an expert witness with respect to the policies,  
9 practices and/or procedures, and training in effect at the Burbank Police Department at the time of  
10 the incident and he will give testimony in respect thereto.

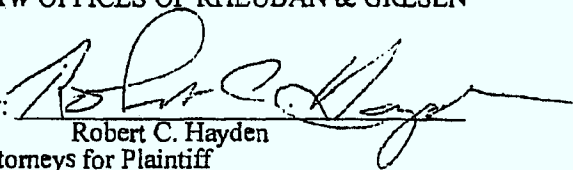
- 11 2. R. William Mathis, Ph.D.  
12 3435 Valle Verde Drive  
13 Napa, CA 91701

14 Dr. Mathis has been designated as an expert witness, who will testify with respect to  
15 emotional and psychological damages Plaintiff suffered as a result of her harassment and  
16 discrimination from the Burbank Police Department.

17 Pursuant to *Code of Civil Procedure* §2034.310, Plaintiff reserves the right to call an expert  
18 to impeach the testimony of an expert witness offered by any other party, including testimony to the  
19 falsity or nonexistence of any fact used as the foundation for any opinion by any other party's expert  
20 witness.

21  
22 Dated: April 19, 2011

LAW OFFICES OF RHEUBAN & GRESEN

23  
24 By:   
25 Robert C. Hayden  
26 Attorneys for Plaintiff  
27  
28

1                   **EXPERT WITNESS DECLARATION OF ROBERT C. HAYDEN**

2           I, Robert C. Hayden, hereby declare:

3           1.    I am an attorney duly licensed to practice before the courts in the State of California.  
4 I have personal knowledge of the facts contained herein and if called upon to testify as a witness,  
5 could and would competently testify thereto.

6           2.    This Declaration is submitted in support of the list of persons whose expert opinion  
7 testimony Plaintiff Steve Karagiosian expects to introduce at trial in the above-entitled matter.

8           3.    The following named experts are designed as expert witnesses with respect to issues  
9 in the above-captioned action:

10                   Oliver "Lee" Drummond  
11                   Drummond, Inc.  
12                   2554 Sequoia Avenue  
13                   Sanger CA 93657 3817  
14                   (559) 876-1061

15  
16                   R. William Mathis, Ph.D.  
17                   3435 Valle Verde Drive  
18                   Napa, CA 91701  
19                   (707) 252-2151

20           4.    At trial, it is expected that Oliver "Lee" Drummond will provide testify concerning  
21 the policies, practices and/or procedures, and training in effect at the Burbank Police Department at  
22 the time of the incident. The policies, practices and/or procedures, and training which should have  
23 been in effect in the Burbank Police Department at the time of the occurrence, as well as the  
24 Departmental response to Plaintiff's allegations of harassment and retaliation and related matters.  
25 He will also provide opinions with respect to the testimony and opinions of other experts.

26           5.    Mr. Drummond has agreed to testify at trial.

27           6.    Mr. Drummond's fee for providing deposition testimony is \$400.00 per hour (3 hour  
28 minimum).

1           7. At trial, Plaintiff intends to call Dr. Mathis who will testify with respect to emotional  
2 and psychological damages Plaintiff suffered as a result of the harassment and discrimination he has  
3 and continues to endure from the Burbank Police Department . He will also provide opinions with  
4 respect to the testimony and opinions of other experts.

5           8. Dr. Mathis has agreed to testify at trial.

6           9. Dr. Mathis's fee for providing deposition testimony is \$375.00 per hour.

7           10. The Curricula Vitae for Mr. Drummond and Dr. Mathis are attached hereto.

8           11. Dr. Mathis and Mr. Drummond will be available for Deposition on a mutually  
9 agreeable date.

10           I declare under penalty of perjury under the laws of the State of California that the  
11 foregoing is true and correct.

12           Executed this 19<sup>th</sup> day of April 2011 in Encino, California.

13  
14  
15             
16           Robert C. Hayden

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## CURRICULUM VITAE

### Oliver "Lee" Drummond

Lee Drummond is a former vice president with PMW Associates, a nationally recognized law enforcement consulting/training firm in Southern California. Prior to his retirement from municipal government, Lee served as a city manager, director of public safety and chief of police for the cities of Sanger, Marlna, Oceanside and Hanford, California, respectively. He has two decades of civilian police command experience in addition to serving over nine years as a city manager. Lee is a graduate of the California Military Academy and a former commissioned U.S. Army Officer in the Military Police Corps.

Lee is a past president of the South San Joaquin Valley City Managers Association and former member of the California City Managers Executive Committee for the League of California Cities. He is a graduate of the League of California Cities City Managers Executive Institute.

Chief Drummond is a past president of the Police Chiefs for the League of California Cities. He served numerous years on the California Police Chiefs Association (CPCA) Training Committee, CPCA Standards and Ethics Committee, the U.S. Attorney's Law Enforcement Coordinating Committee and co-chaired the California Peace Officers Association Training Services Committee. Lee is a past chair of the Tulare-Kings County Criminal Justice Advisory Committee, past chair of the Monterey County Chief Law Enforcement Officers Association (MCCLEOA) Training Committee and MCCLEOA representative on the Monterey Peninsula College Administration of Justice Advisory Committee.

As a California Department of Justice, Commission on Peace Officer Standards and Training (P.O.S.T.) certified instructor since 1975, Lee has taught numerous police academy and college semester classes. He has also taught certification courses in police supervision, management and administration for the Department of Public Safety, State of New Mexico. Lee is currently an adjunct faculty member at the College of the Sequoias.

Lee is an Honor Graduate of the Orange County Sheriff's Academy. The majority of Lee's law enforcement career was with the Santa Ana Police Department where he served in a number of command assignments including Operations and Training Officer for the S.W.A.T. and Tactical Units, Police Academy Commander, Detective Commander and Area Commander.

Lee has assisted numerous police agencies involved in litigation and has qualified in state and federal courts as a police training, tactics and procedures expert. He was one of the initial experts invited to address members of the Los Angeles City Council regarding the highly publicized Rodney King beating incident. Lee was retained as a police procedures consultant in the state and federal criminal trials of the LAPD officers. He later testified as an expert witness in the King v. LAPD federal civil trial.

Chief Drummond has lectured for the International Association of Chiefs of Police, the International Association of Police Planning and Research Officers, the British Columbia Police Commission, the California District Attorneys Association, the League of California Cities, the California Peace Officers Association and the P.O.S.T. Command College.

Lee has received professional honors and recognition including the 1996 ICMA Workplace Diversity Professional Development Award in Washington, D.C.; 1995 League of California Cities Annual City Manager Diversity Award; Law Enforcement Commendation Medal, National Society of the Sons of the American Revolution; 1993 Outstanding Alumnus Award Criminal Justice Department, CSULB; 1983 Hanford City Employee of the Year and 1982 California Police Chief of the Year, Law Enforcement Management Center.

**R. WILLIAM MATHIS, PH.D.  
MANAGEMENT PSYCHOLOGIST**

**Biographical Summary**

Dr. Mathis holds a Ph.D. in Clinical / Industrial Psychology from the University of North Dakota at Grand Forks, a Master's Degree in Clinical Psychology from the University of Portland in Oregon and a Bachelor's degree in Chemistry / Biology and Psychology from the University of Puget Sound in Tacoma, Washington.

Dr. Mathis is the founder of Mathis Group, and has sole proprietorship. The firm is currently located in Napa, California. The firm provides both general management and clinical consulting services to public and private sectors. High risk, safety, law enforcement and crisis related situations are special niches addressed through the clinical psychologists on staff.

Dr. Mathis is a well-known writer and speaker, whose published well-read articles include "When Council is Unhappy with the City Manager," "What Councils want from their Managers... but do not Tell Them," The Business Journal, "Don't Drop the Ball on Your City Council", "The 7 Symptoms of a Manager in Trouble...", "Public Management. He is well known throughout the United States and is frequently seen in both western and east coast cities. His "whole team" concept of intermingling business consultants with psychologists brings a "value added" concept to his clients.

Dr. Mathis and his firm, Mathis Group, offer a wide variety of services such as:

- City Manager / City Attorney Evaluation
- Team Building / Goal Setting Workshops
- Style Analysis - Individual and Group
- Effective Communications
- Problem Solving and Project Management
- Organization / Department Audits
- Strategic Planning
- Executive Recruitments
- Coaching and Mentoring
- Change Management Strategies
- Personnel Conflicts / Outpatient Services

*Biographical Summary for Dr. Bill Mathis*

Mathis Group has been a member of numerous Chambers of Commerce and public organizations including ICMA (International City Managers' Association), California, City Manager's Foundation, National League of Cities and League of California Cities.

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1301 West 2<sup>ND</sup> Street, Suite 205, Los Angeles, CA 90026.

On April 19, 2011, I caused the foregoing documents described as: **PLAINTIFF STEVE KARAGIOSIAN'S EXPERT DISCLOSURE** to be personally served by delivering a true copy thereof enclosed in a sealed envelope addressed as follows:

Lawrence A. Michaels, Esq.  
Mitchell Silberberg & Knupp LLP  
11377 West Olympic Boulevard  
Los Angeles, CA 90064-1683

☐ (BY MAIL) I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Encino, California.

☐ (BY FACSIMILE) I caused such document to be sent by facsimile to the following party:

☒ (BY PERSONAL SERVICE) I delivered by hand to the premises of the addressee.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that the declaration was executed on April 19, 2011 at Encino, California.

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

I am employed in the County of Los Angeles. I am over the age of eighteen and am not a party to the within action. My business address is 15910 Ventura Boulevard, Suite 1610, Encino, California 91436.

On April 19, 2011, I served a copy of the following document described as **PLAINTIFF STEVE KARAGIOSIAN'S EXPERT DISCLOSURE** on the interested parties in this action as follows:

Linda Miller Savitt, Esq.  
Ballard Rosenberg Golper & Savitt, LLP  
500 North Brand Boulevard, Twentieth Floor  
Glendale, California 91203

Robert Tyson, Esq.  
Burke, Williams & Sorensen, LLP  
444 South Flower Street, Suite 2400  
Los Angeles, California 90071

Carol Ann Humiston  
Senior Assistant City Attorney  
Office of the City Attorney  
275 East Olive Avenue,  
Burbank, California 91510-6459

Gregory Smith, Esq.  
Law Offices of Gregory W. Smith  
6300 Canoga Avenue, Suite 1590  
Woodland Hills, CA 91367

Thomas G. Mackey, Esq.  
Jackson Lewis LLP  
725 South Figueroa Street, Suite 2500  
Los Angeles, California 90017

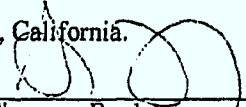
**XX** **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on that date following ordinary business practices. I am "readily familiar" with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. mail Postal Service in Los Angeles, California, in a sealed envelope with postage fully prepaid.

**—** **BY OVERNIGHT DELIVERY:** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed as above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

**—** **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person(s) at the e-mail address listed above. My electronic notification address is sf@rglawyers.com. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful. A copy of the electronic transmission showing the time of service is attached.

**XX** **STATE:** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

EXECUTED on April 19, 2011, at Encino, California.

  
Shannon Ford

6  
**PLAINTIFF STEVE KARAGIOSIAN'S EXPERT DISCLOSURE**

**EXHIBIT C**

**EXHIBIT C**



1 LAWRENCE A. MICHAELS (SBN 107260)  
2 lam@msk.com  
3 MITCHELL SILBERBERG & KNUPP LLP  
4 11377 West Olympic Boulevard  
5 Los Angeles, California 90064-1683  
6 Telephone: (310) 312-2000  
7 Facsimile: (310) 312-3100

**CONFORMED COPY**  
OF ORIGINAL FILED  
Los Angeles Superior Court

MAY 07 2010

John A. Clarke, Executive Officer/Clerk

5 LINDA MILLER SAVITT (SBN 094164)  
6 BALLARD, ROSENBERG, GOLPER & SAVITT LLP  
7 500 North Brand Boulevard, Twentieth Floor  
8 Glendale, California 91203-9946  
9 Telephone: (818) 508-3700  
10 Facsimile: (818) 506-4827

BY Raul Sanchez Dept

11 CAROL A. HUMISTON (SBN 115592)  
12 SENIOR ASSISTANT CITY ATTORNEY - CITY OF BURBANK  
13 275 East Olive Avenue  
14 Burbank, California 91510  
15 Telephone: (818) 238-5707  
16 Facsimile: (818) 238-5724

17 Attorneys for Defendant and Cross-Complainant CITY OF BURBANK, including the  
18 POLICE DEPARTMENT OF THE CITY OF BURBANK (erroneously sued as an  
19 independent entity named "BURBANK POLICE DEPARTMENT")

20 SUPERIOR COURT OF THE STATE OF CALIFORNIA

21 FOR THE COUNTY OF LOS ANGELES

22 OMAR RODRIGUEZ; CINDY GUILLEN-  
23 GOMEZ; STEVE KARAGIOSIAN; ELFEGO  
24 RODRIGUEZ; AND JAMAL CHILDS,

Case No. BC 414602

Date: May 12, 2010

Time: 9:00 a.m.

Judge: The Honorable Joanne O'Donnell

Dept.: 37

25 Plaintiffs,

v.

26 BURBANK POLICE DEPARTMENT; CITY  
27 OF BURBANK; AND DOES 1 THROUGH  
28 100, INCLUSIVE,

**DEFENDANT'S EVIDENTIARY  
OBJECTIONS TO PLAINTIFF'S  
EVIDENCE IN OPPOSITION TO  
MOTION FOR SUMMARY JUDGMENT  
AGAINST PLAINTIFF ELFEGO  
RODRIGUEZ**

Defendants.

29 BURBANK POLICE DEPARTMENT; CITY  
30 OF BURBANK,

[Reply Brief, Consolidated Separate Statement,  
[Proposed] Order Re Evidentiary Objections,  
Responses To Plaintiff's Objections, Appendix Of  
Non-California Authorities, Reply Declaration Of  
Veronica Von Grabow, And Notices of Lodging  
Depositions Filed Concurrently Herewith]

31 Cross-Complainants,

v.

32 OMAR RODRIGUEZ, an Individual;

File Date: May 28, 2009

Trial Date: August 25, 2010

Discovery Referee: The Honorable  
Diane Wayne, Ret.

Cross-Defendant.

Mitchell  
Silberberg &  
Knupp LLP

2676533.1

1  
DEFT'S EVID. OBJNS. RE: MSJ AGAINST PLAINTIFF ELFEGO RODRIGUEZ

1 **Objection No. 238.**

2 "Q Okay. How many black police officers in the department today are above the rank of police  
3 officer?

4 MS. SAVITT: That's irrelevant. Overbroad. Calls for speculation by this witness.

5 MR. GRESEN: He's been there for 20 years.

6 THE VIDEOGRAPHER: Hold on. Hold on. Do you have any idea?

7 THE WITNESS: I don't believe there's any. One has been there for a year and a half. The other's  
8 been there for maybe four years, so...

9 BY MR. GRESEN: Q Do you know how many African-American police officers there are in the  
10 Burbank Police Department total?

11 A I believe four. And two of them have just been -- they have less than a couple of years on.  
12 They're new hires." (Dahlia Depo., 205:4-20.)

13 **Grounds for Objection: No. 238:**

14 The testimony lacks foundation (Evid. Code § 403), is irrelevant (Evid. Code §§ 210, 350-  
15 351), conclusory (Evid. Code § 702), speculative (Evid. Code § 702), vague, and overbroad.

16 Childs attempted to submit the same evidence in opposition to Defendant's summary  
17 judgment papers as to Childs and the Court sustained Defendant's objection based on these very  
18 same grounds.

19 **Court's Ruling on Objection: No. 238 Sustained \_\_\_\_\_**

20 **Overruled \_\_\_\_\_**

21 **OBJECTIONS TO EXHIBIT K - DEPOSITION**

22 **TESTIMONY OF NAYIRI NAHABEDIAN**

23 **Objection No. 239.**

24 "Q. Okay. What do you recall -- and I understand you're not going to recall exactly what was said.  
25 But in sum and substance, what was said between you and Chief Stehr in that first meeting?

26 A. Chief -- the chief let me know about specific issues within the department that were taking  
27 place and -- and had wanted me to do a training so that -- so that we could address some of those  
28 issues. And I -- I -- I gave -- I did what I usually do, which is give as much information as possible  
as to what a training could look like, how it could be done, what are some different ways that it  
could be done and - and what -- what I could help with and what I could possibly not help with.  
For example, long-term ideas that people hold and that four-hour training might -- might not -- is  
not going to perhaps change deep understandings that people have but the -- what -- what we  
could do is to -- and -- is to be able to change people -- impact people's behavior and -- and maybe

1 -- maybe also be able to impact their -- their attitudes and perspectives." (Nahabedian Depo., 16:2-23.)

2 **Grounds for Objection: No. 239:**

3 The testimony lacks foundation (Evid. Code § 403), is irrelevant (Evid. Code §§ 210, 350-  
4 351), conclusory (Evid. Code § 702), speculative (Evid. Code § 702), vague, improper opinion  
5 (Evid. Code § 800) and inadmissible hearsay (Evid. Code § 1200).  
6

7 Childs attempted to submit the same evidence in opposition to Defendant's summary  
8 judgment papers as to Childs and the Court sustained Defendant's objection based on these very  
9 same grounds.

10 **Court's Ruling on Objection: No. 239:** Sustained \_\_\_\_\_

11 Overruled \_\_\_\_\_

12 **Objection No. 240.**

13 "THE WITNESS: Okay. And so there weren't any names of course, but there's the idea that the  
14 chief had gotten information that -- that -that some officers were complaining, and I think that  
15 there was a note -- I remember something about a note being passed to him or given to him that  
16 expressed discontent with issues regarding discrimination and harassment. And that there was a  
17 case going on at the time and -- and -- and -- and -- and -- and some officers were being looked at  
18 or being, I guess -- I don't know if the right word is investigated -- but being looked at in terms of  
19 whether or not these things had occurred. And so -- so that's the information that -- that's the  
20 information that I had and -- can you ask a . . ." (Nahabedian Depo., 19:24-20:13)

21 **Grounds for Objection: No. 240:**

22 The testimony lacks foundation (Evid. Code § 403), is irrelevant (Evid. Code § 210, 350-  
23 351), conclusory (Evid. Code § 702), speculative (Evid. Code § 702), vague, improper opinion  
24 (Evid. Code § 800) and inadmissible hearsay (Evid. Code § 1200).  
25

26 **Court's Ruling on Objection: No. 240:** Sustained \_\_\_\_\_

27 Overruled \_\_\_\_\_

28 **Objection No. 241.**

29 " Q. Yeah, yeah, I'm just waiting for you to finish. Okay. You said that certain officers were being  
30 looked at or investigated. Was it your understanding that, from what the chief told you, that the  
31 department was conducting an investigation into some race-based issues in the department?

32 A. Yes." (Nahabedian Depo., 20:15-21)

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1 Childs attempted to submit the same evidence in opposition to Defendant's summary  
2 judgment papers as to Childs and the Court sustained Defendant's objection based on these very  
3 same grounds.

4 **Court's Ruling on Objection: No. 244: Sustained \_\_\_\_\_**

5 **Overruled \_\_\_\_\_**

6  
7 **Objection No. 245.**

8 "A. My impression was that it was about harassment in terms of based on either sexual – not  
9 sexual, based on race, ethnicity, gender. So those were the issues that had taken place."  
(Nahabedian Depo., 37:21-24.)

10 **Grounds for Objection: No. 245:**

11 The testimony lacks foundation (Evid. Code § 403), is irrelevant (Evid. Code §§ 210, 350-  
12 351), conclusory (Evid. Code § 702), speculative (Evid. Code § 702), vague, improper opinion  
13 (Evid. Code § 800) and inadmissible hearsay (Evid. Code § 1200).

14 Childs attempted to submit the same evidence in opposition to Defendant's summary  
15 judgment papers as to Childs and the Court sustained Defendant's objection based on these very  
16 same grounds.

17 **Court's Ruling on Objection: No. 245: Sustained \_\_\_\_\_**

18 **Overruled \_\_\_\_\_**

19  
20 **Objection No. 246.**

21 "Q. Okay. Did you hear any comments -- well, let's start with negative first. Did you hear any  
22 negative comments about the training or training process from any of the people you were  
training?"

23 A. Yes.

24 Q. How many negative comments did you receive?

25 A. How many negative comments did I receive?

26 Q. Yes.

27 A. There were negative comments at every training. How many at every training? Many."  
28 (Nahabedian Depo., 40:12-22.)

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**Court's Ruling on Objection: No. 247:**    Sustained \_\_\_\_\_  
Overruled \_\_\_\_\_

**Objection No. 248.**

"Q. Thank you. Did you hear the comment that, if they don't get a promotion, they complain racism on more than one occasion?

A. Yes.

Q. Did you hear it on almost every session that you taught?

A. Almost every -- I -- I would say it was most -- it was on most." (Nahabedian Depo., 43:5-12.)

**Grounds for Objection: No. 248:**

The witness fails to identify who made the alleged comments, when the alleged comments occurred, or the context in which the comments were made and thus the testimony lacks foundation (Evid. Code § 403). The testimony is also irrelevant (Evid. Code §§ 210, 350-351), conclusory (Evid. Code § 702), speculative (Evid. Code § 702), vague, and inadmissible hearsay (Evid. Code 1200).

Childs attempted to submit the same evidence in opposition to Defendant's summary judgment papers as to Childs and the Court sustained Defendant's objection based on these very same grounds.

**Court's Ruling on Objection: No. 248:**    Sustained \_\_\_\_\_  
Overruled \_\_\_\_\_

**Objection No. 249.**

"A. "Why do we have to change the way we do things? If they come to this country, they should -- they should -- we shouldn't have to learn about their ways." They should get with the program basically.

Q. Did you hear this complaint on more than one occasion?

A. Yes." (Nahabedian Depo., 43:21-44:3.)



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**Court's Ruling on Objection: No. 250: Sustained** \_\_\_\_\_

**Overruled** \_\_\_\_\_

### Objection No. 251.

“Q. Did any of the officers tell you at the end of the training that they thought it was a waste of time?”

A. Yes" (Nahabedian Depo., 52:7-10.)

### Grounds for Objection: No. 251:

The witness fails to identify who made the alleged comments, when the alleged comments occurred, or the context in which the comments were made and thus the testimony lacks foundation (Evid. Code § 403). The testimony is also irrelevant (Evid. Code §§ 210, 350-351), conclusory (Evid. Code § 702), speculative (Evid. Code § 702), vague, and inadmissible hearsay (Evid. Code § 1200).

Childs attempted to submit the same evidence in opposition to Defendant's summary judgment papers as to Childs and the Court sustained Defendant's objection based on these very same grounds.

**Court's Ruling on Objection: No. 251: Sustained**\_\_\_\_\_

## Overruled

**Objection No. 252.**

**"Q. Let me ask it this way: Please to the best of your recollection, tell me what was said at that meeting.**

A. Okay. So I said that -- you know, we had completed it and -- and other than the diversity-related -- there were diversity-related issues, and there were, you know, other things that kind of came up that were unrelated to it. And so I wanted to communicate that as well. So for . . . ."

(Nahabedian Depo., 55:25-59:8.)

**Grounds for Objection: No. 252:**

The testimony lacks foundation (Evid. Code § 403), is irrelevant (Evid. Code §§ 210, 350-351), conclusory (Evid. Code § 702), speculative (Evid. Code § 702), vague, and inadmissible hearsay (Evid. Code § 1200).

1 Childs attempted to submit the same evidence in opposition to Defendant's summary  
2 judgment papers as to Childs and the Court sustained Defendant's objection based on these very  
3 same grounds.

4 **Court's Ruling on Objection: No. 252:** Sustained \_\_\_\_\_  
5 Overruled \_\_\_\_\_  
6

7 **Objection No. 253.**

8 "Q. Did you tell Chief Stehr or anyone else at a post-training meeting that you believe that the  
9 department had a problem with its attitudes towards --

10 A. Yeah.

11 Q. -- separate races?

12 A. Yes." (Nahabedian Depo., 59:22-60:3)

13 **Grounds for Objection: No. 253:**

14 The testimony lacks foundation (Evid. Code § 403), is irrelevant (Evid. Code §§ 210, 350-  
15 351), conclusory (Evid. Code § 702), speculative (Evid. Code § 702), vague, improper opinion  
16 (Evid. Code § 800) and inadmissible hearsay (Evid. Code § 1200.)

17 Childs attempted to submit the same evidence in opposition to Defendant's summary  
18 judgment papers as to Childs and the Court sustained Defendant's objection based on these very  
19 same grounds.

20 **Court's Ruling on Objection: No. 253:** Sustained \_\_\_\_\_  
21 Overruled \_\_\_\_\_  
22

23 **Objection No. 254.**

24 "Q. Well, I'm wondering if you expressed to anyone that there was more work that needed to be  
done at the City of Burbank with respect to diversity training?

25 A. Yes.

26 Q. And did you express that your belief -- your belief was that they needed more diversity  
27 training?

28 A. Yeah, it was a hope. It was -- yes." (Nahabedian Depo., 60:11-19.)

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**MS. HUREVITZ: Objection. Lacks foundation.**

BY MR. GRESEN: Q. Well, you can give an example. But is that a yes or a no?

**Grounds for Objection: No. 256:**

Childs attempted to submit the same evidence in opposition to Defendant's summary judgment papers as to Childs and the Court sustained Defendant's objection based on these very same grounds.

**Objection No. 257.**

Q. Right. (Nahabedian Depo., 62:14-25)

The testimony lacks foundation (Evid. Code § 403), is irrelevant (Evid. Code §§ 210, 350-351), conclusory (Evid. Code § 702), speculative (Evid. Code § 702), vague, improper opinion (Evid. Code § 800), and inadmissible hearsay (Evid. Code § 1200).

1 Childs attempted to submit the same evidence in opposition to Defendant's summary  
2 judgment papers as to Childs and the Court sustained Defendant's objection based on these very  
3 same grounds.

4 **Court's Ruling on Objection: No. 257: Sustained \_\_\_\_\_**

5 **Overruled \_\_\_\_\_**

6  
7 **Objection No. 258.**

8 "Q. Did anybody tell you that they were afraid to speak out?

9 A. Yeah, I got that from one person who came and approached me about it being important to do"  
10 (Nahabedian Depo., 64:20-25)

11 **Grounds for Objection: No. 258:**

12 The testimony lacks foundation (Evid. Code § 403), is irrelevant (Evid. Code §§ 210, 350-  
13 351), conclusory (Evid. Code § 702), speculative (Evid. Code § 702), vague, improper opinion  
14 (Evid. Code § 800), and inadmissible hearsay (Evid. Code § 1200).

15 Childs attempted to submit the same evidence in opposition to Defendant's summary  
16 judgment papers as to Childs and the Court sustained Defendant's objection based on these very  
17 same grounds.

18 **Court's Ruling on Objection: No. 258: Sustained \_\_\_\_\_**

19 **Overruled \_\_\_\_\_**

20 **OBJECTIONS TO EXHIBIT L – DEPOSITION TESTIMONY OF MARSHA RAMOS**

21 **Objection No. 259.**

22 "city council member end?

23 A. I think it technically ended midnight April 30, 2009. My last meeting -- but it was a formality --  
24 was May 1st, 2009." (Ramos Depo., 12:2-5)

25 "Q. Well, the question was, given the objections, did you have any knowledge of any problems  
26 within the Burbank Police Department concerning racial issues or bias during your tenure as a city  
council member? And I don't think a yes or no would violate any privilege.

27 A. Yes." (Ramos Depo., 15:13-19)

1 **PROOF OF SERVICE**

2 42729-00001

3 *Rodriguez, et al. vs. Burbank Police Department, et al.* — LASC Case No. BC414602

4 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

5 I am employed in the county of Los Angeles, State of California. I am over the age of 18  
6 and not a party to the within action. My business address is Mitchell Silberberg & Knupp LLP,  
11377 West Olympic Boulevard, Los Angeles, California 90064-1683.

7 On May 7, 2010, I served a copy of the foregoing document(s) described as:  
8 **DEFENDANT'S EVIDENTIARY OBJECTIONS TO PLAINTIFF'S EVIDENCE IN**  
9 **OPPOSITION TO MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF**  
10 **ELFEGO RODRIGUEZ** on the interested parties in this action at their last known address as set  
11 forth below by taking the action described below:

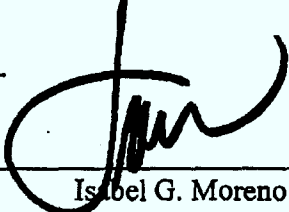
12 Solomon E. Gresen, Esq.  
13 Steven V. Rheuban, Esq.  
14 Law Offices of Rheuban & Gresen  
15 15910 Ventura Boulevard, Suite 1610  
16 Encino, CA 91436  
17 T: (818) 815-2727 — F: (818) 815-2737

18 *Attorneys for Plaintiffs Omar Rodriguez, Cindy Guillen-Gomez,*  
19 *Steve Karagiosian, Elfego Rodriguez, and Jamal Childs*

20 ☒ **BY PERSONAL DELIVERY:** I placed the above-mentioned document(s) in sealed  
21 envelope(s), and caused personal delivery by **FIRST LEGAL SUPPORT SERVICES** of  
22 the document(s) listed above to the person(s) at the address(es) set forth above.

23 I declare under penalty of perjury under the laws of the State of California that the above is  
24 true and correct.

25 Executed on May 7, 2010, at Los Angeles, California.

26   
27 \_\_\_\_\_  
28 Isabel G. Moreno



1 **PROOF OF SERVICE**

2 42729-00001

3 *Rodriguez, et al. vs. Burbank Police Department, et al. — LASC Case No. BC414602*

4 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

5 I am employed in the county of Los Angeles, State of California.

6 I am over the age of 18, and not a party to the within action; my business address is  
7 **FIRST LEGAL SUPPORT SERVICES**, 1511 West Beverly Boulevard, Los Angeles,  
California 90026.

8 On May 7, 2010, I served the foregoing document(s) described as **DEFENDANT'S**  
9 **EVIDENTIARY OBJECTIONS TO PLAINTIFF'S EVIDENCE IN OPPOSITION TO**  
10 **MOTION FOR SUMMARY JUDGMENT AGAINST PLAINTIFF ELFEGO RODRIGUEZ**  
which was enclosed in sealed envelopes addressed as follows, and taking the action described  
below:

11 Solomon E. Gresen, Esq.  
12 Steven V. Rheuban, Esq.  
13 Law Offices of Rheuban & Gresen  
14 15910 Ventura Boulevard, Suite 1610  
Encino, CA 91436  
T: (818) 815-2727 — F: (818) 815-2737

15 *Attorneys for Plaintiffs Omar Rodriguez, Cindy Guillen-Gomez,*  
16 *Steve Karagiosian, Elfego Rodriguez, and Jamal Childs*

17 ☒ **BY PERSONAL SERVICE:** I hand delivered such envelope(s):

18 ☐ to the addressee(s);

19 ☒ to the receptionist/clerk/secretary in the office(s) of the addressee(s).

20 ☐ by leaving the envelope in a conspicuous place at the office of the addressee(s)  
between the hours of 9:00 a.m. and 5:00 p.m.

21 I declare under penalty of perjury under the laws of the State of California that the above is  
22 true and correct.

23 Executed on May 7, 2010, at Los Angeles, California.

24 Omar Eason  
25 Printed Name

24 Omar Eason  
25 Signature



**EXHIBIT D**

**EXHIBIT D**

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/21/10

DEPT. 37

HONORABLE JOANNE O'DONNELL

JUDGE H. A. SMITH

DEPUTY CLERK

HONORABLE  
6.

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

N. AVALOS, C.A.

Deputy Sheriff

C. KWON-CHANG

Reporter

9:00 am

BC414602

Plaintiff  
Counsel

Solomon E. Gresen ✓  
RHEUBAN & GRESEN

OMAR RODRIGUEZ ET AL

VS

Defendant  
Counsel

Lawrence A. Michaels ✓  
Veronica Von Grabow ✓  
MITCHELL SILBERBERG ET AL  
Linda Miller Savitt ✓  
BALLARD ROSENBERG ET AL

BURBANK POLICE DEPARTMENT ET AL

170.6 DAVID P. YAFFE

R/F 7-27-09 Denied as to BC4179

## NATURE OF PROCEEDINGS:

MOTION OF DEFENDANT CITY OF BURBANK FOR SUMMARY JUDGMENT, OR IN THE ALTERNATIVE, SUMMARY ADJUDICATION OF ISSUES AGAINST PLAINTIFF ELFEGO RODRIGUEZ; C/F 5-12-10

## TRIAL SETTING CONFERENCE;

Matter is called for hearing. Counsel have reviewed the court's written tentative ruling. The court hears argument of counsel. The tentative ruling issues as the order of the court as follows:

Plaintiff's Evidentiary Objections are overruled. Plaintiff's evidentiary objections do not comply with CRC Rule 3.1354; plaintiff objects to defendant's facts, not to the evidence supporting the facts (see, e.g., Nos. 65, 66, 67, and 69, all of which object to the same piece of evidence use to support different undisputed facts). Further, plaintiff's objections fail to comply with the format requirements set forth in CRC Rule 3.1354. Plaintiff combines objections to different evidence. (See, e.g., Objection No. 1 - objection to testimony from Stehr declaration and from Lowers' declaration). Notwithstanding these violations, plaintiff's objections are ruled upon on their merits.

Defendant's evidentiary objections are ruled on as follows: Nos. 11, 22, 25, 115, 117, 120, 260 are overruled; the remainder of the evidentiary

Page 1 of 13 DEPT. 37

MINUTES ENTERED  
05/21/10  
COUNTY CLERK

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5/25/10

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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DEPT. 37

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JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

N. AVALOS, C.A.

Deputy Sheriff

C. KWON-CHANG

Reporter

9:00 am BC414602

Plaintiff Solomon E. Gresen ✓  
Counsel RHEUBAN & GRESEN

OMAR RODRIGUEZ ET AL

VS

Defendant Lawrence A. Michaels ✓

BURBANK POLICE DEPARTMENT ET AL

Counsel Veronica Von Grabow ✓

170.6 DAVID P. YAFFE

MITCHELL SILBERBERG ET AL

R/F 7-27-09 Denied as to BC4179

Linda Miller Savitt ✓

BALLARD ROSENBERG ET AL

## NATURE OF PROCEEDINGS:

objections are sustained.

The motion is granted.

Procedural issues. As in the Childs' motion, plaintiff's separate statements fails to comply with CCP §437c(b)(3) or with CRC Rule 3.1350(f) and/or (h). In plaintiff's opposition separate statement, from UF No. 130 through UF 320, instead of stating, on the right side of the page directly opposite the fact in dispute, the nature of the dispute or to describe the evidence that supports the position that the fact is controverted, plaintiff has left the separate statement blank and indicates that the court is to look to the responses to the preceding 130 facts, following defendant's indication of which earlier fact is at issue. (See, e.g., UF 131.) The purpose of the separate statement is to allow the court to review the undisputed facts, those facts which are raised in dispute, and the references to evidence supporting the facts and raising a triable issue; by failing to comply with the format requirements for the separate statement set forth in CRC Rule 3.1350, plaintiff confounds the purpose of the separate statement. The court has discretion to grant the motion on this ground alone. CCP §437c(b)(3). It is likely that, even if the court allowed a continuance to allow plaintiff to correct this defect, plaintiff would not be able to salvage his claims because, as explained below, those of defendant's evidentiary

5/25/10  
5/25/10

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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HONORABLE  
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JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

N. AVALOS, C.A.

Deputy Sheriff

C. KWON-CHANG

Reporter

9:00 am

BC414602

Plaintiff

Solomon E. Gresen ✓

Counsel

RHEUBAN & GRESSEN

OMAR RODRIGUEZ ET AL

VS

Defendant

Lawrence A. Michaels ✓

BURBANK POLICE DEPARTMENT ET AL

Counsel

Veronica Von Grabow ✓

MITCHELL SILBERBERG ET AL

170.6 DAVID P. YAFFE

Linda Miller Savitt ✓

R/F 7-27-09 Denied as to BC4179

BALLARD ROSENBERG ET AL

## NATURE OF PROCEEDINGS:

objections which are sustained preclude plaintiff from presenting sufficient admissible evidence to raise a triable issue of material fact as to any issue as to which defendant seeks summary adjudication.

First cause of action -- discrimination. To prevail on a discrimination claim, a plaintiff must prove that he was (1) in a protected class, (2) performing satisfactorily in his job, (3) he suffered an adverse employment action, and (4) the action occurred under circumstances suggesting a discriminatory motive. *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355; Cal. Gov't Code § 12940 subd. (a).

Defendant meets its initial burden of showing that plaintiff cannot establish a prima facie case of discrimination because plaintiff cannot show an adverse employment action. Notwithstanding that plaintiff asserts that he has since been terminated, any claim arising out of that termination constitutes a separate claim from the claim asserted in the First Amended Complaint, since he had not been terminated at any time relevant to the allegations of the FAC.

Plaintiff's contention that he suffered from a series of highly damaging adverse actions that have "impaired" his "prospects for advancement" within the BPD does not give rise to a triable issue.

Page 3 of 13 DEPT. 37

<b>MINUTES ENTERED</b> 05/21/10 COUNTY CLERK
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# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/21/10

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JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

N. AVALOS, C.A.

Deputy Sheriff

C. KWON-CHANG

Reporter

9:00 am

BC414602

Plaintiff

Solomon E. Gresen ✓

Counsel

RHEUBAN & GRESEN

OMAR RODRIGUEZ ET AL

VS

Defendant

Lawrence A. Michaels ✓

BURBANK POLICE DEPARTMENT ET AL

Counsel

Veronica Von Grabow ✓

170.6 DAVID P. YAFFE

MITCHELL SILBERBERG ET AL

R/F 7-27-09 Denied as to BC4179

Linda Miller Savitt ✓

BALLARD ROSENBERG ET AL

## NATURE OF PROCEEDINGS:

Plaintiff presents no admissible evidence raising a triable issue of material fact as to whether any of these actions, other than in purely speculative terms, had any effect, let alone "impaired" his "prospects for advancement." "A change that is merely contrary to the employee's interests or not to the employees liking is insufficient." Akers v. County of San Diego (2002) 95 Cal.App.4th 1441, 1455. "[T]he proper standard for defining an adverse employment action is the 'materiality' test, a standard that requires an employer's adverse action to materially affect the terms and conditions of employment." Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1036.

1. "Loss of assignment" to the SED Unit.  
Plaintiff does not dispute that the SED unit was disbanded. (UF 11.) Plaintiff cannot dispute that there were thereafter no available positions in the SED unit, so the "loss of assignment" to the SED unit cannot constitute an adverse employment action. Plaintiff's claim that the SED unit was disbanded in order to deprive him of the opportunity to work in it is solely his speculation. (UF 32.) Further, the undisputed fact that the SED unit ceased to exist precludes plaintiff from asserting discrimination with respect to the assignment to the SED unit since the absence of a position in the unit is dispositive of his claim. It is further undisputed that the department was not accepting application for a position within the SED unit

5/23/10  
5/23/10

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/21/10

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JUDGE

H. A. SMITH

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ELECTRONIC RECORDING MONITOR

N. AVALOS, C.A.

Deputy Sheriff

C. KWON-CHANG

Reporter

9:00 am

BC414602

Plaintiff

Solomon E. Gresen ✓

Counsel

RHEUBAN & GRESEN

OMAR RODRIGUEZ ET AL

VS

Defendant

Lawrence A. Michaels ✓

BURBANK POLICE DEPARTMENT ET AL

Counsel

Veronica Von Grabow ✓

MITCHELL SILBERBERG ET AL

170.6 DAVID P. YAFFE

Linda Miller Savitt ✓

R/F 7-27-09 Denied as to BC4179

BALLARD ROSENBERG ET AL

## NATURE OF PROCEEDINGS:

after it was disbanded. A claim based on denial of a particular job position requires that an opening for that position actually exist. Guz, supra, at 355 n.21.

2. Assignment to the SRT unit. Plaintiff does not and cannot dispute that he was selected for the SRT unit. Plaintiff fails to present admissible evidence sufficient to raise a triable issue of material fact as to whether the Caucasian candidates who were selected were less qualified than he was; accordingly, he cannot make a prima facie case of discrimination, i.e., that he was treated differently than other similarly situated persons.

3. Assignment as a field training officer. Plaintiff's assertion that he was passed over for a temporary (one week) assignment to fill in for a training officer does not create a triable issue where plaintiff does not and cannot dispute that he was at other times assigned as an field training officer. (UF 52) Plaintiff fails to present sufficient admissible evidence to raise a triable issue of material fact as to whether defendant's stated reasons for filling the one-week assignment were pretextual based on plaintiff's race. (Even if the evidence were admissible, plaintiff fails to dispute the undisputed facts.) (UF 49-56.)

4. Assignment to the "worst patrol assignment in

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/21/10

DEPT. 37

HONORABLE JOANNE O'DONNELL

JUDGE

H. A. SMITH

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JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

N. AVALOS, C.A.

Deputy Sheriff

C. KWON-CHANG

Reporter

9:00 am

BC414602

Plaintiff  
Counsel

Solomon E. Gresen ✓  
RHEUBAN & GRESEN

OMAR RODRIGUEZ ET AL

VS

Defendant  
Counsel

Lawrence A. Michaels ✓  
Veronica Von Grabow ✓  
MITCHELL SILBERBERG ET AL  
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BALLARD ROSENBERG ET AL

BURBANK POLICE DEPARTMENT ET AL

170.6 DAVID P. YAFFE

R/F 7-27-09 Denied as to BC4179

## NATURE OF PROCEEDINGS:

the entire department following the disbandment of SED." "A change that is merely contrary to the employee's interests or not to the employees liking is insufficient." Akers v. County of San Diego (2002) 95 Cal.App.4th 1441, 1455; Yanowitz v. L'Oreal USA, Inc. (2005) 36 Cal.4th 1028, 1036. It is undisputed that plaintiff did not suffer any loss of pay or demotion of rank. There is no admissible evidence sufficient to raise a triable issue of material fact as to whether the assignment after SED disbanded was the "worst patrol assignment" in the department; plaintiff presents no admissible evidence to raise a triable issue of material fact as to whether this assignment materially affected the terms and conditions of his employment, other than that it was a different assignment.

Each of the purported adverse employment actions asserted by plaintiff involved nothing more than assignment to a particular police officer duty. None of the actions identified by plaintiff involved any change in his rank as a police officer. (UF 5, 38, 51.) None of the actions involved any change in compensation. (UF 4, 37, 50.) It cannot be disputed that plaintiff had the opportunity to work, and did work, in each of the assignments he identifies. Rodriguez was assigned to the SED unit, leaving that unit only when it was disbanded. (UF 2 and 3.) Rodriguez was assigned to the SRT team. (UF 33.) Rodriguez was assigned

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<b>MINUTES ENTERED</b> 05/21/10 COUNTY CLERK
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5/26/10

5/26/10



# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/21/10

DEPT. 37

HONORABLE JOANNE O'DONNELL

JUDGE H. A. SMITH

DEPUTY CLERK

HONORABLE  
6.

JUDGE PRO TEM

ELECTRONIC RECORDING MONITOR

N. AVALOS, C.A.

Deputy Sheriff

C. KWON-CHANG

Reporter

9:00 am BC414602

Plaintiff	Solomon E. Gresen ✓
Counsel	RHEUBAN & GRESSEN
Defendant	Lawrence A. Michaels ✓
Counsel	Veronica Von Grabow ✓
	MITCHELL SILBERBERG ET AL
	Linda Miller Savitt ✓
	BALLARD ROSENBERG ET AL

OMAR RODRIGUEZ ET AL  
VS  
BURBANK POLICE DEPARTMENT ET AL  
  
170.6 DAVID P. YAFFE  
R/F 7-27-09 Denied as to BC4179

## NATURE OF PROCEEDINGS:

to work as a Field Training Officer. (UF No. 52.)  
That he was not given those assignments at  
precisely the times he wanted to work them does not  
create a triable issue that he suffered an adverse  
employment action.

All of defendant's evidentiary objections which are  
sustained render plaintiff unable to raise a  
trialable issue of material fact as to whether he  
suffered an adverse employment action.

Defendant also has met its initial burden of  
showing that its reasons for challenged assignments  
were not pretextual, to wit, that the assignments  
were made for a legitimate nondiscriminatory  
reason. (UF 1-64.) Plaintiff fails to present  
admissible evidence sufficient to raise a triable  
issue of material fact as to whether defendant  
acted with a discriminatory purpose, i.e., that the  
stated reasons for any of the assignments are  
pretextual. Plaintiff fails to demonstrate that  
there is any "conflict of evidence" as to the  
proffered explanation, where there is nothing  
incompatible about the different reasons supporting  
the decision to disband the SED unit. There is no  
admissible evidence supporting plaintiff's  
contention that he was passed over for SRT because  
other less qualified officers were chosen. The  
testimony of Christopher Dunn does not raise a  
trialable issue because it is subject to evidentiary  
objections. Plaintiff fails to raise a triable

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5/26/10



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Deputy Sheriff

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Reporter

9:00 am

BC414602

Plaintiff

Solomon E. Gresen ✓

Counsel

RHEUBAN & GRESEN

OMAR RODRIGUEZ ET AL

VS

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Lawrence A. Michaels ✓

BURBANK POLICE DEPARTMENT ET AL

Counsel

Veronica Von Grabow ✓

170.6 DAVID P. YAFFE

MITCHELL SILBERBERG ET AL

R/F 7-27-09 Denied as to BC4179

Linda Miller Savitt ✓

BALLARD ROSENBERG ET AL

## NATURE OF PROCEEDINGS:

issue regarding the assignment of the one-week FTO assignment.

The court rejects plaintiff's attempt to assert a new, unpled, theory of liability, namely, that plaintiff suffered discrimination based on disparate impact. A party opposing summary judgment may not advance an unpleaded legal theory to defeat the motion. The pleadings serve as the "outer measure of materiality" in a summary judgment motion, and the motion may not be granted or denied on issues not raised by the pleadings. Government Employees Ins. Co. v. Sup.Ct. (Sims) (2000) 79 Cal.App.4th 95, 98; Laabs v. City of Victorville (2008) 163 Cal.App.4th 1242, 1258.

Second cause of action -- harassment. To establish unlawful harassment that is actionable under FEHA, a plaintiff must establish (1) he belongs to a protected group; (2) he was subjected to unwelcome acts or words based on his protected status; (3) the workplace was permeated with discriminatory intimidation, ridicule and insult that is so pervasive or severe it altered the conditions of employment and created an abusive working environment; and (4) respondeat superior. Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 610. Defendant meets its initial burden of showing that plaintiff cannot establish a prima facie case of harassment because plaintiff does not identify with any admissible evidence any

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Reporter

9:00 am

BC414602

Plaintiff

Solomon E. Gresen ✓

Counsel

RHEUBAN & GRESSEN

OMAR RODRIGUEZ ET AL

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Lawrence A. Michaels ✓

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Counsel

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MITCHELL SILBERBERG ET AL

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Linda Miller Savitt ✓

R/F 7-27-09 Denied as to BC4179

BALLARD ROSENBERG ET AL

## NATURE OF PROCEEDINGS:

racially offensive conduct that was severe or pervasive. Plaintiff's harassment claim is based on vague memories of hearing words that he interpreted as offensive, without providing any details about who used the words or in what context. (UF 81.) The conduct of which plaintiff complains is too occasional, isolated, and sporadic to constitute unlawful harassment. (UF 82, 83, 85-89.) "[O]ccasional, isolated, sporadic or trivial" acts cannot support a harassment claim as a matter of law. Fisher v. San Pedro Peninsula Hospital (1989) 214 Cal.App.3d 590, 610; Smith v. Northwest Financial Acceptance, Inc. (10th Cir. 1997) 129 F.3d 1408, 1414. Moreover, the absence of a tangible job detriment requires a higher showing of a concerted pattern of harassment of a "repeated, routine or generalized nature." Fisher, supra, at 610. All of defendant's evidentiary objections which are sustained render plaintiff unable to raise a triable issue of material fact as to whether there was any racially offensive conduct that was severe or pervasive.

Third cause of action -- retaliation. To state a prima facie case of FEHA retaliation, a plaintiff must show that (1) he engaged in "protected activity" by complaining to the employer of discrimination or participating in activities opposing the employer's practices reasonably believed to be unlawful under §12940, (2) the decision maker took an adverse employment action

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# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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Deputy Sheriff

C. KWON-CHANG

Reporter

9:00 am BC414602

Plaintiff

Solomon E. Gresen ✓

Counsel

RHEUBAN & GRESEN

OMAR RODRIGUEZ ET AL

VS

Defendant

Lawrence A. Michaels ✓

BURBANK POLICE DEPARTMENT ET AL

Counsel

Veronica Von Grabow ✓

170.6 DAVID P. YAFFE

MITCHELL SILBERBERG ET AL

R/F 7-27-09 Denied as to BC4179

Linda Miller Savitt ✓

BALLARD ROSENBERG ET AL

## NATURE OF PROCEEDINGS:

against plaintiff, and (3) the action would not have been taken but for the complaint. Mokler v. County of Orange (2007) 157 Cal.App.4th 121, 138. Rodriguez cannot establish a prima facie case of retaliation under FEHA because, as shown above, it is undisputed that plaintiff did not suffer any adverse employment action in retaliation for any protected activity. As for plaintiff's claim that his recent termination demonstrates an adverse employment action, plaintiff did not allege such termination in his operative complaint, nor has plaintiff sought to amend his complaint to so allege.

Defendant has met its initial burden of showing no triable issue of material fact as to whether defendant engaged in any retaliatory conduct with respect to Rodriguez. All of defendant's evidentiary objections which are sustained render plaintiff unable to raise a triable issue of material fact as to whether plaintiff suffered any retaliation.

Fifth cause of action -- failure to prevent discrimination, harassment, and retaliation. Because actionable harassment or discrimination is a necessary prerequisite to a failure to prevent claim, Trujillo v. North County Transit District (1998) 63 Cal.App.4th 280, and because defendant has demonstrated that no triable issue of material fact exists with respect to those claims such that

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05/21/10

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N. AVALOS, C.A.

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Reporter

9:00 am

BC414602

Plaintiff

Solomon E. Gresen ✓

Counsel

RHEUBAN & GRESEN

OMAR RODRIGUEZ ET AL

VS

Defendant

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Veronica Von Grabow ✓

170.6 DAVID P. YAFFE

MITCHELL SILBERBERG ET AL

R/F 7-27-09 Denied as to BC4179

Linda Miller Savitt ✓

BALLARD ROSENBERG ET AL

## NATURE OF PROCEEDINGS:

defendant is entitled to summary adjudication of those claims, the fifth cause of action fails.

Sixth cause of action -- violation of the Public Safety Officers Procedural Bill of Rights. Plaintiff's POBRA claim alleges officers were retaliated against for filing complaints and grievances for harassment, discrimination, retaliation, and also asserts failure to discipline offending officers. (FAC ¶124.) Rodriguez also alleges Burbank did not "follow standard investigatory procedures into complaints of misconduct and/or poor performance lodged against individual Plaintiffs herein, by failing to complete the investigation with [sic] one (1) year, among other things." (FAC ¶124(h).) It is undisputed, however, that plaintiff was never disciplined and was never denied a promotion. (UF 59, 60.)

In addition, plaintiff never filed a claim alleging any POBRA violation under the Government Claims Act. Accordingly, plaintiff is barred from pursuing this claim. Plaintiff's argument that this defect is curable and the cause of action is not time-barred since other POBRA violations have occurred since the filing of the FAC within the last six months is unavailing. Any new POBRA claims not alleged in the operative complaint present a factual theory that was never alleged in the complaint because plaintiff did not amend the

5/25/10  
5/25/10

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

DATE: 05/21/10

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ELECTRONIC RECORDING MONITOR

N. AVALOS, C.A.

Deputy Sheriff

C. KWON-CHANG

Reporter

9:00 am

BC414602

Plaintiff

Solomon E. Gresen ✓

Counsel

RHEUBAN & GRESSEN

OMAR RODRIGUEZ ET AL

VS

Defendant

Lawrence A. Michaels ✓

BURBANK POLICE DEPARTMENT ET AL

Counsel

Veronica Von Grabow ✓

170.6 DAVID P. YAFFE

MITCHELL SILBERBERG ET AL

R/F 7-27-09 Denied as to BC4179

Linda Miller Savitt ✓

BALLARD ROSENBERG ET AL

## NATURE OF PROCEEDINGS:

complaint to add this new theory. A party opposing summary judgment may not advance an unpleaded legal theory to defeat the motion. Government Employees Ins. Co. v. Sup.Ct. (Sims) (2000) 79 Cal.App.4th 95, 98.

All of defendant's evidentiary objections which are sustained render plaintiff unable to raise a triable issue of material fact as to whether defendant violated POBRA.

Seventh cause of action -- injunction. Plaintiff's request for injunctive relief is premised on his meritless claims for FEHA and POBRA violations. The claim for injunctive relief thus has no merit.

Trial setting conference is held.

The trial date of August 25, 2010, and the final status conference date of August 19, 2010, are advanced and vacated.

Matter is set for jury trial on April 13, 2011, at 9:00 a.m. in this department as to plaintiff Cindy Guillen. Trial estimate is 10 days.

Matter is set for final status conference on April 4, 2011, at 9:00 a.m. in this department.

Matter is set for jury trial on June 8, 2011, at 9:00 a.m. in this department as to plaintiff Steve

# SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

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ELECTRONIC RECORDING MONITOR

N. AVALOS, C.A.

Deputy Sheriff

C. KWON-CHANG

Reporter

9:00 am

BC414602

Plaintiff  
Counsel

Solomon E. Gresen ✓  
RHEUBAN & GRESEN

OMAR RODRIGUEZ ET AL

VS

Defendant  
Counsel

Lawrence A. Michaels ✓  
Veronica Von Grabow ✓  
MITCHELL SILBERBERG ET AL  
Linda Miller Savitt ✓  
BALLARD ROSENBERG ET AL

BURBANK POLICE DEPARTMENT ET AL

170.6 DAVID P. YAFFE

R/F 7-27-09 Denied as to BC4179

## NATURE OF PROCEEDINGS:

Karagiosian. Trial estimate is 10 days.

Matter is set for final status conference on  
May 31, 2011, at 9:00 a.m. in this department.

Matter is set for jury trial on July 27, 2011, at  
9:00 a.m. in this department as to plaintiff Omar  
Rodriguez. Trial estimate is 10 days.

Matter is set for final status conference on  
July 11, 2011, at 9:00 a.m. in this department.

Pursuant to stipulation of counsel, all discovery  
deadlines shall be pursuant to code based upon the  
new trial dates.

Notice is waived.

**EXHIBIT E**

**EXHIBIT E**

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1118(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1118(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1118.

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SECOND APPELLATE DISTRICT**

**DIVISION FOUR**

**OMAR RODRIGUEZ et al.,**

**Plaintiffs and Appellants,**

**v.**

**BURBANK POLICE DEPARTMENT  
et al.,**

**Defendants and Respondents.**

**B227414**

**(Los Angeles County  
Super. Ct. No. BC414602)**

**COURT OF APPEAL - SECOND DIST.**

**FILED**

**FEB 27 2012**

**JOSEPH A. LAINE**

**Clerk**

**Deputy Clerk**

**APPEAL from a judgment of the Superior Court of Los Angeles County,  
Joanne B. O'Donnell, Judge. Affirmed.**

**Law Offices of Rheuban & Gresen, Steven M. Cischke and Solomon E.  
Gresen for Plaintiffs and Appellants.**

**Ballard, Rosenberg, Golper & Savitt and Linda Miller Savitt; Mitchell  
Silberberg & Knupp, Lawrence A. Michaels and Veronica T. von Grabow for  
Defendants and Respondents.**



On May 28, 2009, appellants Omar Rodriguez, Cindy Guillen-Gomez, Steve Karagiosian, Elfego Rodriguez and Jamal Childs (collectively appellants) brought an action against respondent City of Burbank (City) and the Burbank Police Department under the California Fair Employment and Housing Act (FEHA)<sup>1</sup> and the Public Safety Officers Procedural Bill of Rights Act (POBRA).<sup>2</sup> City filed its motion for summary judgment against appellant Elfego Rodriguez<sup>3</sup> on February 26, 2010. The trial court granted the motion on July 12, 2010, a judgment was entered, and Elfego has appealed from the judgment against him.

In the meantime, on June 17, 2010, appellants filed a motion to disqualify the two law firms that represent City. The trial court denied that motion, and all appellants have appealed the denial of this motion.

We have consolidated the appeals for the purposes of oral argument and decision, and affirm the trial court's rulings.

### **ELFEGO'S APPEAL FROM SUMMARY JUDGMENT**

The operative, first amended complaint (hereafter complaint) alleges seven causes of action; all but two are predicated on various subdivisions of Government Code section 12940 (hereafter section 12940). In numerical order, these five causes of action are for discrimination, harassment, wrongful retaliation, wrongful failure to accommodate, and failure to take reasonable steps to prevent

---

<sup>1</sup> Government Code section 12900 et seq.

<sup>2</sup> Government Code section 3300 et seq. This claim has been abandoned in the appeal.

<sup>3</sup> We will refer to Omar and Elfego Rodriguez by their first names to avoid confusion and not out of a lack of courtesy. The other defendants will be referred to by their last names.

discrimination, harassment and wrongful retaliation. The cause of action alleging violations of POBRA has been abandoned in this appeal. The final, seventh cause of action is for injunctive relief.

The factual allegations that pertain to Elfego individually are that Elfego was hired by the Burbank police department in June 2004; that he performed very well throughout, receiving numerous commendations; and that he was selected to serve in the prestigious Special Enforcement Detail (SED). The complaint alleges that during Elfego's tenure with the Burbank police department, he was subjected to discrimination, harassment and wrongful retaliation, that he reported these incidents but that nothing was done about them. The complaint alleges that Elfego, who is of Guatemalan descent, has been taunted by fellow officers as looking "like the bad guys we chase" and that Hispanics are commonly referred to by Burbank police officers in racially degrading ways, such as "half-breed." Offensive racial epithets are common, according to the complaint, which create, among other things, a hostile work environment. The complaint also alleges that Elfego, like other minorities, has been denied promotion because of his race.

Elfego contends that the trial court erred in (1) not allowing him to amend his complaint before hearing the summary judgment motion, (2) in sustaining various objections to the evidence he submitted in response to the motion, and (3) in granting summary judgment. None of the contentions has merit.

## **I. Amendment of the Complaint**

### **A. Procedural Background**

City's summary judgment motion was initially set for May 12, 2010. In the interim, on March 30, 2010, the Burbank police department terminated Elfego. Thereafter, on April 6, 2010, before Elfego had filed any responsive papers, he

filed an ex parte application to continue the hearing on the summary judgment motion or to take it off calendar. The application stated that there had been a change in Elfego's status, and that Elfego "intends to apply to this court for leave to amend the Complaint." The attorney's supporting declaration stated that "Plaintiffs intend to file a motion for leave to amend this Complaint to (a) include the new facts of Plaintiffs Elfego and Omar Rodriguez' wrongful termination in violation of FEHA and POBRA, and (b) plead a claim for disparate impact in the Complaint." The declaration stated that July 16, 2010 had been reserved for the hearing to amend the complaint.

City filed an opposition to the ex parte application to continue. City pointed out that the opposition to the summary judgment motion was then due on April 28, 2010 and that Elfego had not articulated what facts he could not discover by April 28, 2010.

The trial court denied the ex parte application to continue the summary judgment hearing. In its minute order, the court stated that it could not foresee whether the expected motion to amend the complaint would be granted and, if it were granted, whether an amendment to the complaint would affect the motion for summary judgment.

Elfego never filed a motion to amend the operative, first amended complaint. Instead, he filed his opposition to the motion for summary judgment on April 28, 2010. In a single footnote on the last page of Elfego's memorandum in opposition to the motion was the remark that if the court did not agree that Elfego had shown that he had a prima facie case, the court should "treat this motion as a motion for judgment on the pleadings and allow Plaintiff to file an amended complaint."

The hearing of the motion for summary judgment took place on May 21, 2010. The court's tentative ruling was to grant the motion, which remained the court's ruling. The judgment was entered on July 12, 2010.

**B. The Trial Court Never Ruled that Elfego Could Not Amend his Complaint**

Elfego contends that the trial court erred "in not allowing appellant to amend the complaint to allege the facts of his termination." (Capitalization and bolding omitted.) He is mistaken. Elfego never filed a motion to amend the first amended complaint. Thus, the court never ruled that Elfego would not be permitted to amend. To the contrary, the court simply denied Elfego's ex parte application to continue the hearing on the summary judgment motion, in the absence of a properly filed motion to amend the complaint.

In a single footnote on the last page of Elfego's memorandum in opposition to the motion for summary judgment was the comment that if the court did not agree that Elfego had shown that he had a prima facie case, the court should "treat this motion as a motion for judgment on the pleadings and allow Plaintiff to file an amended complaint." We note that, for the purposes of an appeal, an argument placed in a footnote in an appellate brief is deemed to have been waived and will not be considered by the court. (*Evans v. CenterStone Development Co.* (2005) 134 Cal.App.4th 151, 160.) We see no reason why this should not apply to a filing in a trial court. In fact, there is every reason to do so since a trial court, faced with the ever-daunting task of wading through hundreds of pages of text in a motion for summary judgment, which was certainly true of this case, can hardly be expected to rule on a bare request in a single footnote, unsupported by any factual material, case authority, or a proposed amended complaint, to "treat this [summary

judgment] motion as a motion for judgment on the pleadings and allow Plaintiff to file an amended complaint.” To put it differently, if Elfego wanted to amend the complaint, it was his responsibility to file a motion to amend. It was not the trial court’s duty, upon the reading of the footnote, to set a hearing for a non-existent motion to amend.

Finally, Elfego does not actually contend that the court erred in denying a continuance of the summary judgment motion. Accordingly, we need not address that issue. We note in passing, however, that the court’s order of April 6, 2010 denied only the request for an ex parte hearing, and did not obviate properly a noticed motion for a continuance or an ex parte application to hear such a motion on shortened notice.

In sum, the trial court never ruled that Elfego could not amend the first amended complaint.

## **II. Summary Judgment**

### **A. Adverse Employment Action**

Elfego contends that he raised a triable issue of material fact as to whether he suffered an adverse employment action. Therefore, the trial court erred in adjudicating his first cause of action for employment discrimination based on race. (Gov. Code, § 12940, subd. (a) (hereafter “section 12940”).<sup>4</sup> We disagree.

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<sup>4</sup> It is an unlawful employment practice: “For an employer, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, genetic information, marital status, sex, gender, gender identity, gender expression, age, or sexual orientation of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training program leading to employment, or to discriminate against the person in compensation or in terms, conditions, or privileges of employment.” (§ 12940, subd. (a).)

Summary judgment is granted when the moving party satisfies “the burden of persuasion that there is no triable issue of material fact and that he is entitled to judgment as a matter of law. . . . There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof.” (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850, fn. omitted (*Aguilar*).) A defendant moving for summary judgment bears an initial burden of production to make a prima facie showing that one or more elements of the cause of action cannot be established, or that there is a complete defense. He may sustain this burden by showing that the plaintiff does not have, and cannot reasonably obtain, evidence to prove one or more elements of the cause of action by a preponderance of the evidence. If he succeeds, the burden of production shifts to the plaintiff to make a prima facie showing that a triable issue of material fact exists as to the cause of action. (See *Aguilar, supra*, 25 Cal.4th at pp. 850-851.)

In determining whether a triable issue of material fact exists, the court must strictly construe the moving party’s papers. However, the opposing party’s evidence must be liberally construed to determine the existence of a triable issue of fact. “All doubts as to whether any material, triable issues of fact exist are to be resolved in favor of the party opposing summary judgment.” (*Barber v. Marina Sailing, Inc.* (1995) 36 Cal.App.4th 558, 562; see *Aguilar, supra*, 25 Cal.4th at p. 843.)

The prohibition of discrimination set forth in section 12940 “is often restated in judicial opinions as a requirement that the discriminatory action result in ‘adverse employment action.’” (*Horsford v. Board of Trustees of California State*

*University* (2005) 132 Cal.App.4th 359, 373.) “In some cases, adverse action affecting ‘terms, conditions, or privileges of employment’ (actionable) is contrasted with changes that merely displease the employee (not actionable). [Citation.] In other words, changes in terms and conditions of employment must be both *substantial and detrimental* to be actionable.” (*Ibid.*, italics added.) Examples of adverse employment actions are removing a police lieutenant from a position near the top of the department and then removing him from all law enforcement duties; and suspension from duty, even if the leave is with pay. (*Id.* at p. 374.)

As the court held it in *Guz v. Bechtel National, Inc.* (2000) 24 Cal.4th 317, 355, an employee with a FEHA discrimination claim under section 12940, subdivision (a) must provide evidence that he or she suffered an adverse employment action, such as termination, demotion, or denial of an available job. The standard for defining an adverse employment action is the “materiality” test, “a standard that requires an employer’s adverse action to materially affect the terms and conditions of employment.” (*Yanowitz v. L’Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1036.) Here, as City demonstrated in its motion, Elfego claims to have been subjected to four adverse employment actions, none of which rises to the level of an adverse employment action. Therefore, he does not have and cannot produce evidence to support that essential element of his cause of action.

The first alleged adverse employment action on which Elfego relies is the “loss of assignment to the prestigious SED [Special Enforcement Detail] unit when it was disbanded.” However, as City’s evidence showed, Elfego was selected for SED by Captain Janice Lowers in or around October 2008. Later, SED, whose function was to assist police detectives, was disbanded in May 2009. In a declaration filed in support of summary judgment, Captain Lowers explained that



the reasons for disbanding SED were budgetary and the decision to shift more officers into patrol.

Elfego claims that SED was disbanded because Elfego and fellow officer and co-plaintiff Steve Karagiosian complained about racist comments that were allegedly displayed on a board in a hallway. But he supports this contention by citing his own statement of disputed facts, as he does throughout his opening brief. City, citing *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 178, footnote 4, points out, correctly, that the statement of a disputed fact is not evidence and it is *evidence* that Elfego must produce; we set forth the relevant holding in the margin.<sup>5</sup>

In any event, there is simply no evidence that SED was disbanded because Elfego and others complained about the racist comments on the board. Elfego claims in his brief that this was so, but he produced no evidence below to support this assertion. Even if the employer has lied about the reasons for the employment action (and that of course is Elfego's position), there must be "evidence supporting a rational inference that *intentional discrimination, on grounds prohibited by the statute, was the true cause* of the employer's actions." (*Guz v. Bechtel National, Inc.*, *supra*, 24 Cal.4th at p. 361.) To illustrate, if the chief of police had said that blacks and Mexicans could not serve in SED, this would be evidence of intentional discrimination. But there is nothing discriminatory in being upset about complaints, even if one were to assume that this was true.

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<sup>5</sup> "Here, both parties repeatedly cite their own 'separate statement' (see Code Civ. Proc., § 437c, subd. (b)) as the *sole* support for numerous 'facts.' However, a separate statement is not evidence; it *refers* to evidence submitted in support of or opposition to a summary judgment motion. In an appellate brief, an assertion of fact should be followed by a citation to the page(s) of the record containing the supporting evidence." (*Jackson v. County of Los Angeles*, *supra*, 60 Cal.App.4th at p. 178, fn. 4.)



The next alleged adverse employment action was that Elfego was passed over for service in the Special Response Team (SRT) for two "lesser qualified Caucasian candidates." As City's evidence showed, Elfego was passed over three times for SRT, which is Burbank's equivalent of a SWAT team. The qualifications of the three officers who preceded Elfego were four years on an SRT-type police team in Monrovia, service on the Los Angeles sheriff department's Emergency Response Team, Marine Corps service as an expert marksman and training in close quarters combat tactics. Elfego had no particular qualifications, and certainly none of the foregoing. It was also true that he did not perform as well as the three officers did on the shooting range and the obstacle course test. Finally, Elfego preceded another Caucasian officer to the SRT. Moreover, as with SED, Elfego was actually selected for SRT.

The third allegedly adverse employment action was that Elfego was not selected to fill in for a Training Officer for the period between June 27 and July 4, 2009. The fact of the matter is that Elfego served as a Field Training Officer from January 2007 to October 2008, when he joined SED. The two officers who were selected for the one-week period were picked because they had expressed an interest and were otherwise good officers. Elfego produced no evidence that he was passed over for this one-week assignment because of intentional discrimination.

The fourth and final alleged adverse employment action was the "worst patrol assignment in the entire department following the disbandment of SED." Because Elfego provides no evidence to support this claim, we disregard it.

As we have noted, the standard for defining an adverse employment action is the "materiality" test, "a standard that requires an employer's adverse action to materially affect the terms and conditions of employment." (*Yanowitz v. L'Oreal*

*USA, Inc., supra*, 36 Cal.4th at p. 1036.) As City points out, Elfego's actual complaint is not that he was denied SED, SRT and work as a Training Officer; he is complaining about the *timing* of these assignments. Given that timing appears to be the issue, Elfego fails to offer even a rudimentary explanation why timing rendered the aforesaid assignments adverse employment actions.

When viewed realistically, the employment actions of which he complains were not material since he actually did get these assignments, though not at the precise times that he wanted them. The fact that he did receive all three assignments militates heavily against the finding that the employment actions were even adverse, to begin with, and, if adverse, whether they were substantial, as the law requires. (*Horsford v. Board of Trustees of California State University, supra*, 132 Cal.App.4th at p. 373.) In other words, Elfego has failed to raise a triable issue that he was subjected to adverse employment actions.

#### **B. Harassment**

Elfego contends that triable issues of material exist as to his second cause of action for harassment. However, as City demonstrated in its motion below, his deposition testimony flatly contradicts the claim of harassment.

In 2008, an outside investigator and attorney, Irma R. Moisa, was retained to investigate charges made in an anonymous letter about racial and ethnic slurs made by unnamed Burbank police officers. Elfego was among those interviewed by Moisa. Elfego told her that had heard some derogatory comments about Hispanics during his first year with the Burbank police department (he started in 2004) but had heard no offensive remarks thereafter. Elfego confirmed this in his deposition that was taken in October 2009.

Not every utterance of a racial slur in the workplace violates FEHA. (*Aguilar v. Avis Rent A Car System, Inc.* (1999) 21 Cal.4th 121, 130.) The harassment, to be actionable, must be so pervasive and severe that it alters the conditions of employment and creates an abusive work environment. (*Fisher v. San Pedro Peninsula Hospital* (1989) 214 Cal.App.3d 590, 610.) Illustrative of statements that Elfego cites in his appeal and that do not qualify under the foregoing test is the statement by another officer that Elfego looked like “the bad guys” the Burbank police chases.

Finally, we agree with City that claims based on racial slurs made during Elfego’s first year with the Burbank police in 2004-2005 are time-barred since the applicable statute is one year (Gov. Code, § 12960, subd. (d)) and Elfego filed his complaint in May 2009.

#### **B. Retaliation and Failure to Prevent Discrimination**

“To establish a prima facie case of retaliation ‘a plaintiff must show (1) she engaged in a protected activity, (2) her employer subjected her to an adverse employment action, and (3) there is a causal link between the two.’” (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 138.)

In the present case, there is insufficient evidence to raise a triable issue that City took adverse employment actions against Elfego. Therefore, Elfego’s claims for retaliation and harassment fail.

#### **C. Ruling on Objections**

Elfego contends that a number of the trial court’s rulings sustaining City’s objections to evidence propounded by Elfego were erroneous. “The court’s evidentiary rulings made on summary judgment are reviewed for abuse of

discretion.” (*Walker v. Countrywide Home Loans, Inc.* (2002) 98 Cal.App.4th 1158, 1169.) We briefly discuss the rulings to which Elfego refers. We find no reversible error.

We have a general observation that applies to many of the objections Elfego addresses. The crux of the matter is whether Elfego can point to evidence that intentional discrimination was the true cause of the employer’s actions (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 361); it need not be direct evidence, but the inference must be rational (*ibid.*). Measured against this standard, much of the evidence that Elfego has propounded is immaterial. As an illustration, the evidence that the chief of police used the word “Nigger” is not of probative significance. The chief could have used the word as an illustration of what *not* to say, or he could have been quoting someone, or it could have been an aside uttered in bad taste but without any intent to demean anyone. The circumstances under which the word was used, or the setting in which it was used, would go a long way to instill some relevance to this item of evidence. Without the setting in which the word was used, it is not evidence of intentional discrimination.

The court sustained City’s objection to the following in Elfego’s declaration:

Objection 110

“I [Elfego] witnessed and heard Chief Stehr use the word ‘Nigger’ in a management meeting in November 2008. He did not use the term as an instruction to the officers that they should discontinue its use. While it is true that Chief Stehr did not encourage the officers to use the term, it was clear in his tone that he regretted that the term could no longer be used publicly.”

We agree with City that the bulk of the foregoing is speculation about Chief Stehr’s state of mind. Even if the first sentence was not speculative, it was, at best, of marginal relevance for reasons that we have given above.

### Objection 126

An objection was sustained to this passage in Deputy Chief William Taylor's declaration:

"I was at a Management Team meeting on or about November 2008 in which Chief Stehr used the word 'Nigger.' I did not interpret Chief Stehr's comment as an effort on his part to teach anyone in the room that use of that term was unauthorized or would not be tolerated."

The second sentence speculates about Stehr's state of mind and was inadmissible. Even if otherwise admissible, the first sentence was of marginal relevance for the stated reasons.

### Objection 8

The trial court sustained an objection to the following from Elfego's declaration:

"Nevertheless, racial and ethnic slurs have continued in the Department, though not as frequent since this lawsuit was filed. During the past two years I have heard the term 'wetback,' 'Julios,' 'gardeners,' and 'half-breed' used on the Burbank Police Department premises on numerous occasions."

This statement contradicts Elfego's deposition testimony that he had not heard any racial slurs since October 2009 and therefore the court properly disregarded it. (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21-22.) This rule is of particular importance to this case. The complaint alleges that there were "numerous incidents of race based . . . discrimination;" when the complaint is closely examined, the "incidents" boil down to racial epithets. It is therefore particularly significant that Elfego's deposition testimony effectively nullifies an important part of his case.

Objection 101

Another objection was sustained to a similar passage, and the ruling is it is correct for the same reason that objection 8 was correctly sustained.

The remaining objections were interposed to the declaration of Deputy Chief William Taylor.

Objection 118

“Assignment as a Field Training Officer is an excellent opportunity for professional growth.”

This is irrelevant. Standing alone, whether this assignment was valuable simply sheds no light on whether the police department intentionally discriminated against Elfego. In other words, there is no connection between the value of serving as a Field Training Officer and intentional discrimination.

Objection 122

The statement was that SED budgetary issues had been resolved prior to Elfego’s assignment to that unit.

If Elfego’s point is that City was dissembling when it claimed that SED was disbanded because of budgetary consideration, this still does not amount to evidence of intentional discrimination. Even if the employer has lied about the reasons for the employment action, there still must be evidence, direct or circumstantial, of intentional discrimination. (*Guz v. Bechtel National, Inc., supra*, 24 Cal.4th at p. 361.)

Objection 123

A lengthy passage addressed the planning of a Special Problems Unit to replace SED.

This is irrelevant. Elfego's point is once again that City is dissembling about the disbanding of SED. Our observation about objection 122 applies here as well.

Objection 124

The statement was that Taylor was normally involved in the decision making process.

It is difficult to see a connection between this fact and Elfego's case. Very possibly, the point of this is once again that the reason given for disbanding SED was a subterfuge. If so, our comment about objection 122 applies.

Objection 119

A lengthy statement that SED was a valuable experience for a police officer. We cannot see how this is relevant since Elfego did serve in the SED.

Objection 125

The statement was that Captain Lynch was targeting minority recruits for termination.

This was inadmissible insofar as it speculated regarding Captain Lynch's state of mind. Even if it was admissible, it is conclusory and its exclusion was not prejudicial.

Objection 127

"Chief Stehr told me that Ms. Moisa uncovered some very serious discrimination concerns. Chief Stehr told me that despite numerous allegations of discrimination, there would only be two small investigations. I suggested to Chief Stehr that there should be more investigations, but he disagreed. He then restated that he would only authorize two small investigations."

The bulk of this is inadmissible hearsay.

City interposed 281 objections. The trial court overruled seven of them and sustained the rest. We see no prejudicial error in the trial court's rulings.

#### **D. Conclusion**

We conclude that Elfego's contentions are without merit and that the trial court did not err in granting the motion for summary judgment.

### **APPELLANT'S APPEAL FROM THE DENIAL OF THE DISQUALIFICATION MOTION**

Appellants contend that the trial court erred in denying their motion to disqualify counsel for the City. For the reasons set forth below, we disagree.

#### **I. The Pertinent Facts**

City noticed the depositions of appellants in June 2009 and concurrently served each of them with requests to produce documents. Among the documents produced was a 44-page statement by appellant Omar.<sup>6</sup> It was, in fact, produced twice, once by Omar and also by Guillen. The Gomez productions occurred on or about July 31, 2009. We will refer to this document as the Statement.

During the first deposition, City's counsel posed a question to Omar about the Statement, which seems to have been the first time that the Statement surfaced after its production. After some colloquy, Omar's counsel Gresen stated that the Statement might be privileged. In a letter dated August 12, 2009, Gresen flatly asserted that it was privileged, a position City's counsel rejected in a letter responding to Gresen's August 12th communication.

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<sup>6</sup> As before, we use Omar Rodriguez's first name for clarity and not out of a lack of courtesy.



The Statement referred to a number of exhibits, some of which turned out to be confidential police personnel records. A dispute later arose over those records, resulting in City bringing a cross-complaint against Omar for conversion.

The matter slumbered until December 22, 2009 when City, learning that Omar was seeking a protective order with regard to the Statement, asked retired Judge Wayne, the discovery referee, to have the issue briefed. City was still contending that the Statement was not privileged. After the briefs were in and a hearing had been held, the discovery referee recommended that City be ordered to return the Statement, a recommendation the court adopted on March 15, 2010.

The motion to disqualify City's two law firms was filed on June 17, 2010.

We note that the standard of review is abuse of discretion. (*Brand v. 20th Century Ins. Co./21st Century Ins. Co.* (2004) 124 Cal.App.4th 594, 601.)<sup>7</sup>

## **II. City Acted Reasonably In Contending that the Statement Was Not Privileged**

We have examined the Statement that has been filed in this court under seal. We agree with the trial court that there is nothing about the Statement that suggests that it was privileged. It is by-and-large a chronological account of Omar's career in the Burbank police department from 1988 to 2009 and, as the trial court observed, the document could have been prepared for many possible purposes. It

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<sup>7</sup> "We review a trial court's ruling on a disqualification motion for abuse of discretion, and we accept as correct all express or implied findings that are supported by substantial evidence. [Citations.] 'However, the trial court's discretion is limited by the applicable legal principles. [Citation.] Thus, where there are no material disputed factual issues, the appellate court reviews the trial court's determination as a question of law. [Citation.] In any event, a disqualification motion involves concerns that justify careful review of the trial court's exercise of discretion. [Citation.]'" (*Brand v. 20th Century Ins. Co./21st Century Ins. Co.*, *supra*, 124 Cal.App.4th at p. 601.)

is not marked "Confidential" or "Privileged" at any point of its 44 pages and it is not directed to an attorney. Litigation is not mentioned or discussed. While there are four passing references to meetings with a lawyer at pages 39, 41 and 42, these references are very brief and completely neutral.

It is true that if a lawyer comes into possession of a document that is clearly and indubitably privileged, the lawyer is under a duty not to examine the document and must notify the possessor of the privilege that the lawyer has the document. (*Rico v. Mitsubishi Motors Corp.* (2007) 42 Cal.4th 807, 817.) But this is not such a case.

This brings us to the observation that Omar's, rather his counsel's, conduct between August and December 2009 certainly did *not* signal that Omar's side of this case considered the Statement either vital or privileged. The logical thing to have done in August, once the Statement surfaced, was to demand the document back immediately and, once this was refused, file an expedited motion in court. City was entitled to interpret Omar's inaction as a lack of zeal for the proposition that the Statement was privileged. If Omar had doubts, City was certainly entitled to have *its* doubts.

### **III. There is No Chance that the Statement Will Affect the Outcome of the Case**

We begin with the observation that it is far from clear that the Statement is privileged. We have already noted its principal features; none of which suggests that it is privileged. In essence, the Statement is a long litany of complaints about the Burbank police department and a good number of its members. Every item of information in the Statement could have properly been elicited in discovery.

Assuming, however, that the Statement is privileged, there are two points to be made.

First, “Mere exposure to the confidences of an adversary does not, standing alone, warrant disqualification. Protecting the integrity of judicial proceedings does not require so draconian a rule. Such a rule would nullify a party’s right to representation by chosen counsel any time inadvertence or devious design put an adversary’s confidences in an attorney’s mailbox.” (*State Comp. Ins. Fund v. WPS, Inc.* (1999) 70 Cal.App.4th 644, 657.)

Second. “Since the purpose of a disqualification order must be prophylactic, not punitive, the significant question is whether there exists a genuine likelihood that the status or misconduct of the attorney in question will affect the outcome of the proceedings before the court. Thus, disqualification is proper where, as a result of a prior representation or through improper means, there is a reasonable probability counsel has obtained information the court believes would likely be used advantageously against an adverse party during the course of the litigation.” (*Gregori v. Bank of America* (1989) 207 Cal.App.3d 291, 308-309.)

That City’s lawyers have seen the contents of the Statement could not have any effect on the outcome of the case. The Statement contains no secrets and no information that is otherwise unavailable. In fact, almost all of it involves conversations with other people and some of it describes actions by others as well as by Omar when in the company of others. In a word, everything in the Statement is public knowledge.

There is, finally, the point that the court in *Gregori v. Bank of America*, *supra*, put very well: “Additionally, as courts are increasingly aware, motions to disqualify counsel often pose the very threat to the integrity of the judicial process that they purport to prevent. [Citation.] Such motions can be misused to harass

opposing counsel [citation], to delay the litigation [citation], or to intimidate an adversary into accepting settlement on terms that would not otherwise be acceptable.” (*Gregori v. Bank of America, supra*, 207 Cal.App.3d at pp. 300-301.) There is really no explanation why Omar’s counsel waited ten months to file the motion to disqualify counsel. Given that the motivations behind such motions are usually hard to identify reliably, all one can do is to note the delay and its pragmatic effect. And that was to inject new issues into a case that already appeared to be failing.

Finally, we address the final issue whether City used the Statement during the fall of 2009. Once the Statement came to light in August and the tentative claim of privilege was asserted, the parties agreed that the Statement would not be used by City until the issue of confidentiality had been resolved. Omar contends that City breached this agreement in several ways, which City denies.

As the trial court correctly observed, the Statement could not be considered privileged until December 30, 2009, when the discovery referee ordered that City return the Statement to Omar. Until then the matter was hotly contested and, as we have observed, City acted reasonably in contesting the matter.

Without detailing them, City’s disclaimers that it did not make use of the Statement are convincing. Nonetheless, if it made some use of the Statement prior to December 30, 2009, it was entitled to do so. If Omar did not want this to happen, it was up to his lawyer to act with dispatch to prevent it, which he did not.

#### **IV. Conclusion**

The trial court’s order denying the motion to disqualify counsel is supported by substantial evidence and was a sound exercise of its discretion.

**DISPOSITION**

The judgment and the order denying the motion to disqualify are affirmed. City is to recover its costs in both appeals.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

WILLHITE, J.

We concur:

EPSTEIN, P. J.

MANELLA, J.

1 **PROOF OF SERVICE**

2 STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

3 I am employed in the county of Los Angeles, State of California.

4 I am over the age of 18, and not a party to the within action; my business address is , .

5 On March 27, 2012, I served the foregoing document(s) described as **DEFENDANT CITY OF**  
6 **BURBANK'S BRIEF REGARDING THE INADMISSIBILITY OF TESTIMONY OF**  
7 **NAYIRI NAHABEDIAN; DECLARATION OF VERONICA VON GRABOW IN**  
**SUPPORT THEREOF** which was enclosed in sealed envelopes addressed as follows, and taking  
the action described below:

8 Solomon E. Gresen, Esq., seg@rglawyers.com  
Steven V. Rheuban, Esq., svr@rglawyers.com  
9 Law Offices of Rheuban & Gresen  
Los Angeles County Superior Court  
10 111 North Hill Street  
Los Angeles, CA 90012  
11 Attorneys for Plaintiffs Omar Rodriguez, Cindy  
Guillen-Gomez, Steve Karagiosian, Elfego  
12 Rodriguez, and Jamal Childs

13 ☒ **BY PERSONAL SERVICE:** I hand delivered such envelope(s):

14 ☒ to the addressee(s);

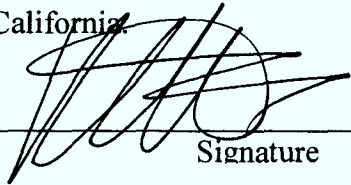
15 ☐ to the receptionist/clerk/secretary in the office(s) of the addressee(s).

16 ☐ by leaving the envelope in a conspicuous place at the office of the addressee(s)  
17 between the hours of 9:00 a.m. and 5:00 p.m.

18 I declare under penalty of perjury under the laws of the State of California that the above is  
19 true and correct.

20 Executed on March 27, 2012, at Los Angeles, California.

21 Veronica von Grabow  
22 Printed Name

23   
24 Signature